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Supreme Court of the United States

DON EUGENE SIEGELMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under *McCormick v. United States*, 500 U.S. 257, 273 (1991), a connection between a campaign contribution and an official action is a crime "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking."

Does this standard require proof of an "explicit" *quid pro quo* promise or undertaking in the sense of actually being communicated expressly, as various Circuits have stated; or can there be a conviction based instead only on the inference that there was an *unstated* and *implied* agreement, a state of mind, connecting the contribution and an official action?

2. Does the "intent" clause of the obstruction of justice statute 18 U.S.C. § 1512(b)(3) ("with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . .") require proof of the specific intent to interfere with communications to law enforcement? Or is this element of the statute satisfied by proof of an intent to engage in a "coverup" more generically?

PARTIES TO THE PROCEEDING BELOW

The parties in the Court of Appeals were Don Eugene Siegelman (Petitioner), as Defendant-Appellant; Richard Scrushy, as Defendant-Appellant; and United States of America (Respondent), Appellee.

There were other defendants in the District Court, Paul Michael Hamrick and Gary Mack Roberts, but they were not parties in the Court of Appeals.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Don Eugene Siegelman respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009).

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 561 F.3d 1215, is reproduced in the Appendix at 1a-61a. The order of the Court of Appeals denying rehearing is reproduced in the Appendix at 62a. The order and opinion of the United States District Court for the Middle District of Alabama, denying motions

for judgment of acquittal, is at 65a-72a. The relevant jury instructions as given by the District Court are at 63a-64a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals issued its decision on March 6, 2009. The Court of Appeals denied Governor Siegelman's timely application for rehearing on May 14, 2009.

STATUTES INVOLVED

The statutes at issue are in the appendix, 73a-75a.

STATEMENT

Petitioner, Don Siegelman, was the Governor of Alabama from 1999 to 2003. He had previously served as Alabama's Lieutenant Governor, Secretary of State, and Attorney General.

In 2005, Governor Siegelman was indicted along with other defendants in the United States District Court for the Middle District of Alabama. The jury rejected most charges, but convicted Governor Siegelman on seven counts.

Six of those counts were 18 U.S.C. §§ 1341 and 1346 "honest services" mail fraud, 18 U.S.C. § 666 bribery, and conspiracy charges, all relating to Governor Siegelman's appointment of co-defendant Richard Scrushy to the State's Certificate of Need (C.O.N.) Board. The theory of the prosecution was that Governor Siegelman's exercise of his appointment power was linked to contributions that Scrushy had raised to support a referendum campaign. The campaign, which Governor Siegelman supported, would have

established a State lottery to fund public education. The seventh and final count of conviction was an obstruction of justice charge under 18 U.S.C. § 1512(b)(3).

This Petition presents important questions of law, raising the concern that Governor Siegelman has been convicted for things that are not crimes. Answers to these questions are important, not only for the sake of Governor Siegelman, but for the sake of all elected officials throughout the nation, and of all who contribute to electoral or issue-referendum campaigns.

A. The charges relating to the C.O.N. Board appointment, and Question 1.

Government officials often appoint major political contributors to boards, ambassadorships and the like. Likewise, government officials often take other actions, such as voting on legislation or taking executive action, that benefit people who have given them campaign contributions. Some degree or type of linkage between contribution and action can be inferred in many cases, if not all.

What degree or type of linkage is enough to take a case across the line from politics (which voters can take into account as they see fit) into crime? This Court answered this question, as to the Hobbs Act, in *McCormick v. United States*, 500 U.S. 257, 273 (1991): there is a crime "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking."

The present case involves other statutes, yet it implicates the same concerns and considerations that drove the decision in *McCormick*. And it calls upon this Court to clarify what the *McCormick* standard is. Does it require proof of an actual communication by the official, promising or agreeing that the action will follow the contribution? Or can there be a conviction based instead only on the inference of an unspoken state of mind linking the two?

The allegation underlying the first six counts of conviction, in this case, was that there was an unlawfully close connection between Governor Siegelman's appointment of Scrushy to the C.O.N. Board, and Scrushy's raising of contributions for a referendum campaign that Governor Siegelman supported. It is this alleged connection, and the legal question of what sort of connection must be proven to take such a situation out of the realm of mere politics in the realm of crime, that makes or breaks all of these counts.[1]

Scrushy was the CEO of one of Alabama's, and the nation's, leading healthcare corporations. He had served on Alabama's C.O.N. Board through appointment by three previous Governors. There is nothing at all odd about appointing a healthcare executive to the Board; in fact, several seats on the Board are

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[1] There was nothing else allegedly unlawful about Governor Siegelman's appointment of Scrushy, other than its alleged connection to the contributions. This is confirmed by the fact that the Court of Appeals reversed Governor Siegelman's conviction on two counts, for insufficiency of the evidence. Those were the counts having to do with things that Scrushy or others had done while on the C.O.N. Board; the Court of Appeals realized that there was no evidence that Governor Siegelman was complicit in any such thing. [23a-29a, 561 F.3d at 1229-32].

reserved by law to health care provider representatives. [4a-5a, 561 F.3d at 1220 & n.5].

One of Governor Siegelman's initiatives, during his campaign and his administration, was a State lottery, with the proceeds to support education. Other States had instituted such programs with great success. Under Alabama law, the institution of such a program would require a vote of the people. There was, therefore, an issue-advocacy or referendum campaign on the question. Governor Siegelman raised contributions to a fund supporting the pro-lottery side of that referendum campaign. [4a, 561 F.3d at 1220].

Scrushy raised and made substantial contributions to the lottery campaign. And Governor Siegelman reappointed Scrushy to the C.O.N. Board.

What connection, if any, was there between the contributions and the appointment? The key parts of the prosecution's evidence came through the testimony of Governor Siegelman's former aide Nick Bailey, who was testifying under a cooperation agreement with the government and hoping for a reduced sentence himself. Taking Bailey's testimony as true, one could conclude that Governor Siegelman sent word to Scrushy that he wanted Scrushy to contribute substantially to the lottery campaign. And one could conclude that Bailey told Governor Siegelman that Scrushy wanted reappointment to the C.O.N. Board. One could also conclude, from the evidence, that Scrushy or his colleagues saw the contribution as the key to obtaining the reappointment.

In terms of what Governor Siegelman knew or said about any connection between the contribution and the appointment, again the high-water mark of the prosecution's evidence came through Bailey's testi-

mony. Bailey testified that he "reminded the Governor periodically of the conversations that [Bailey] had with [Scrushy associate] Eric Hanson and the conversations that the Governor had with Eric Hanson about what Mr. Scrushy wanted for his contributions, and that was the CON Board." [6a, 561 F.3d at 1221]. And Bailey testified that after Scrushy made the first substantial contribution, Bailey and Governor Siegelman had a conversation. As the Court of Appeals recounted it, "Bailey asked, 'what in the world is he [Scrushy] going to want for that?' Siegelman replied, 'the CON Board.' Bailey then asked, 'I wouldn't think that would be a problem, would it?' Siegelman responded, 'I wouldn't think so.'" [7a, 561 F.3d at 1221].

In other words, there is certainly no evidence beyond a reasonable doubt that Governor Siegelman actually promised Scrushy, or overtly agreed with him, that an appointment to the C.O.N. Board would be given in exchange for contribution to the lottery campaign. The Court of Appeals did not suggest that there was such evidence. Instead it held, as we will discuss in more depth below, that *McCormick* does not require such evidence.

Governor Siegelman presented and preserved his contention about the applicable legal standard following *McCormick*, both in terms of jury instructions and in terms of sufficiency of the evidence.

Governor Siegelman proposed jury instructions that would have told the jury of the necessity of proof beyond a reasonable doubt of an "explicit *quid pro quo*" connection between the contributions and the appointment. And he objected to the District Court's instructions on the grounds that they failed to include that element. The District Court's "honest

services" fraud instructions required no proof of a *quid pro quo* arrangement at all, but instead allowed conviction upon the mere conclusion that Governor Siegelman "intended" to act "as a result of" campaign contributions. [63a]. The District Court's § 666 instructions told the jury that there must be proof that the official and the contributor "agree that the official will take specific action in exchange for the thing of value." [18a-19a, 561 F.3d at 1227]. But, over Governor Siegelman's objection, the District Court refused to tell the jury that such "agreement" must be of the "explicit" sort, as contrasted with being just a matter of an unspoken state of mind that is inferred from the circumstances.

On appeal, Governor Siegelman continued to press the argument that the *McCormick* standard applies to these statutes, and that it requires proof of an "explicit *quid pro quo*," an "explicit promise or undertaking by the official" linking the official act to the campaign contribution. Governor Siegelman argued that an inference about what the official had in mind is not enough; what must be shown under the *McCormick* standard, he argued, is an actual communication from the official, promising the action in exchange for the contribution.

The Court of Appeals did not deny that the *McCormick* standard applies to the "honest services" statute and to § 666, just as it does to the Hobbs Act. Nor did the Court of Appeals deny that the *McCormick* standard applies to cases involving referendum or issue-advocacy contributions, just as it does to election campaigns.

And, crucially, the Court of Appeals did not suggest that the evidence was sufficient, or that the jury instructions were correct, if Governor Siegelman was

correct on the content of the *McCormick* standard. The Court of Appeals did not suggest that the conviction could be affirmed if the law requires proof of an actual overt *quid pro quo* promise or undertaking.

Instead, the Court of Appeals affirmed the conviction on these counts by disagreeing with Governor Siegelman as a matter of law on the content of the *McCormick* standard. The crux of the court's reasoning was that when this Court in *McCormick* required an "explicit promise or undertaking," an "explicit *quid pro quo*," the word "explicit" did not mean "express," or actually spoken.

> *McCormick* does use the word "explicit" when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions. It does not, however, mean *express*. Defendants argue that only "proof of actual conversations by defendants," will do, suggesting in their brief that only express words of promise overheard by third parties or by means of electronic surveillance will do.
>
> But *McCormick* does not impose such a stringent standard.

[16a, 561 F.3d at 1225-26 (emphasis in original)].

The Court of Appeals took *McCormick*'s word "explicit" to mean only that there must be an agreement, express *or* implied, linking the contribution to some "specific" official action. But the Court of Appeals insisted that the agreement does not have to be actually communicated expressly; it is enough, said the Court of Appeals, if the jury can infer the existence of an unspoken agreement from the surrounding circumstances.

> Since the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no requirement that it be *express*.

[17a, 561 F.3d at 1226 (emphasis in original)]. The Court of Appeals further stated, in this vein, "Furthermore, an explicit agreement may be 'implied from [the official's] words and actions.'" [18a, 561 F.3d at 1226 (brackets in original)]. Likewise the Court of Appeals insisted that the evidence was sufficient to prove the requisite "state[] of mind," regardless of whether a *quid pro quo* promise was made expressly. [21a, 561 F.3d at 1228].

So in the Eleventh Circuit, the "explicit" aspect of *McCormick*'s standard does not mean "express," or overtly communicated. Furthermore, according to the decision below, a promise that is merely "implied," and is only a matter a "state[] of mind" rather than being verbally expressed, can nonetheless be deemed "explicit" within the meaning of *McCormick*. As we will show below, there is a clear split in authority between the decision below, and the decisions of other Circuits; and this is a question on which ambiguity and regional difference are especially intolerable.

B. The § 1512(b)(3) charge, and Question 2.

Other than the counts pertaining to the C.O.N. Board appointment, the sole remaining count of conviction charged one act as obstruction of justice under 18 U.S.C. § 1512(b)(3): that Governor Siegelman caused his then-aide Nick Bailey to write him a check for $2,973.35, with a notation on the check saying "balance due on m/c." This was the purchase price for the remaining interest in a motorcycle that, upon the

completion of this transaction, Bailey had bought in full from Governor Siegelman.[2]

The Court of Appeals viewed Bailey's purchase of the motorcycle as part of an effort to "cover up" a "'pay-to-play' payment" that another person, Lanny Young, had allegedly made. [2a, 561 F.3d at 1219]. (On the merits, the jury had rejected all charges alleging that there was actually such a "pay to play" scheme with Young.) The theory is that this purchase of the motorcycle was not *bona fide*. The theory is that what was really going on was that Young had, earlier, indirectly given money to Governor Siegelman through Bailey, and this check was part of an effort to make it seem in retrospect as though that alleged indirect transfer had just been a loan to Bailey so that he could buy the motorcycle.

The Court of Appeals, affirming the denial of Governor Siegelman's motion for judgment of acquittal, set forth its view of the facts pertaining to the § 1512(b)(3) charge at 561 F.3d at 1222-23, and 1233-36. 9a-11a, 32a-38a. The Court of Appeals opined that there was sufficient evidence to conclude that Governor Siegelman had persuaded Bailey, and that he had engaged in misleading conduct towards Bailey's lawyer, in regard to the check from Bailey to Governor Siegelman. (Persuading, and engaging in misleading conduct, are two of the types of acts that can constitute a violation of § 1512(b)(3), if done with the intent that the law prohibits.) And the Court of Appeals deemed the evidence sufficient to show that the check was part of a "coverup" of an earlier payment from Young. That colloquialism—"coverup" or

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[2] Governor Siegelman had earlier bought the motorcycle for himself. [9a, 561 F.3d at 1222].

"cover up," repeated at least sixteen times in the appellate opinion—was the centerpiece of the Eleventh Circuit's portrayal of the facts.

The second question for this Court asks whether the facts portrayed by the Court of Appeals, even if true, make out a violation of the statute. As we will show, the Court of Appeals upheld the conviction only by giving the statute a broad coverage that is at odds with the statute's plain text. The statute has a precise and narrower coverage; and it involves a required element of proof that neither the Eleventh Circuit, nor the prosecutors, even claimed was satisfied here. That is the element that the statute itself sets forth: "with intent to . . . hinder, delay, or prevent . . . communication to a law enforcement officer or judge . . . " By adopting the loose colloquialism "coverup" in place of adherence to the text of the statute's "intent" clause, the Court of Appeals departed from the law and from decisions of other Circuit Courts.

REASONS FOR GRANTING THE PETITION

A. The first question presented is of enormous importance to all elected officials and campaign contributors, is the subject of a Circuit split, and is a question on which ambiguity in the law is intolerable.

On the first question presented, there is deep disagreement among the federal Circuit Courts about the legal standard that makes a crime of the alleged connection between a campaign contribution and an official action. As a result of the decision below, the Circuit Courts are now divided as to whether this Court's decision in *Evans v. United States*, 504 U.S. 255 (1992), dilutes the "explicit *quid pro quo*" stan-

dard of *McCormick v. United States*, 500 U.S. 257, 273 (1991), in cases involving campaign contributions.

As explained above, the standard of *McCormick* is that a linkage between a campaign contribution and an official action is criminal "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id.*

This Court, in *McCormick*, recognized how important it is, that there be a clear line in this context to divide the lawful from the unlawful. That was one of the avowed goals of *McCormick* itself: to ensure that there is clarity as to where that line is. The Court noted that officials routinely serve constituents; that campaigners must necessarily raise money through contributions; and that there will be situations in which official action affecting a contributor will follow close in time to a contribution. *McCormick*, 500 U.S. at 272. The Court applied a "clear statement" rule to Congress, inferring that Congress would speak clearly about such situations if it wished to forbid them in a criminal statute. *Id.* at 272-73. And this Court, upon adopting the stringent "explicit promise or undertaking" standard, again emphasized the value of clarity in the law: "This formulation defines the forbidden zone of conduct with sufficient clarity." *Id.* at 273.

The year after *McCormick*, this Court decided *Evans*; and as a result of *Evans*, what was made clear in *McCormick* became arguably less clear. The question that this Court took up in *Evans* was something entirely separate from the *McCormick* "explicit *quid pro quo*" question. It was "whether an affirmative act

of inducement by a public official, such as a demand, is an element of the offense of extortion 'under color of official right' prohibited by the Hobbs Act." *Evans*, 504 U.S. at 256. *Evans* was not petitioned, briefed, or argued as a case about the meaning of, or possible alteration of, the *McCormick* "explicit *quid pro quo*" standard for cases involving contributions.

But in the end, this Court's decision in *Evans* included a short passage mentioning *McCormick*:

> We reject petitioner's criticism of the instruction, and conclude that it satisfies the *quid pro quo* requirement of *McCormick v. United States*, 500 U.S. 257 (1991), because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense.

Evans, 504 U.S. at 268. And Justice Kennedy, concurring in part and concurring in the judgment, wrote a separate opinion that included views on *quid pro quo* as an element of all Hobbs Act extortion cases. *Id.* at 272-78. Included in Justice Kennedy's separate opinion was the view that the *quid pro quo* does not have to be stated "in express terms" in order to amount to a crime. *Id.* at 274.

After *Evans*, there are now two competing schools of thought about the nature of the "explicit *quid pro quo*" requirement under *McCormick*, in cases involving campaign contributions. (1) In some Circuits, including at least the Second, Sixth, and Ninth, the prosecution is required to prove that there was an explicit, meaning "express," promise or agreement by the official that he would take the official action in exchange for the contribution. An inference about

unspoken states of mind is not enough in those Circuits, in a case involving campaign contributions rather than some personal payment to the official. (2) The competing view, exemplified by the decision below, insists that the contributor and the official can both be convicted if the jury could find that there was an *unspoken, merely implied*, exchange of contribution for a certain official action. [16a-18a, 521 F.3d at 1226 (treating *Evans* as support for the rule allowing conviction based on unspoken states of mind and implicit linkage between contribution and official action)]. It is not clear that any other Circuit shares the view of the Eleventh Circuit in this regard.

It is important, for the sake of all elected officials, candidates, and campaign contributors, that there be clarity and uniformity on the answer to this question. As the Court of Appeals admitted in this very case, the answer to this question will implicate, and affect, core First Amendment values and interests.

> The bribery, conspiracy and honest services mail fraud convictions in this case are based upon the donation Scrushy gave to Siegelman's education lottery campaign. As such, they impact the First Amendment's core values—protection of free political speech and the right to support issues of great public importance. It would be a particularly dangerous legal error from a civic point of view to instruct a jury that they may convict a defendant for his exercise of either of these constitutionally protected activities. In a political system that is based upon raising private contributions for campaigns for public office and for issue referenda, there is ample opportunity for that error to be committed.

[13a-14a, 561 F.3d at 1224].

Several Circuits have held that, after *Evans* and *McCormick*, the law is as follows: (1) that for cases involving official action allegedly taken in exchange for *campaign contributions*, *McCormick*'s original "explicit *quid pro quo*" standard still robustly applies, meaning that prosecutors must prove an "express" promise or agreement linking the contribution and the official action; and (2) that for cases where the official has personally received money that is *not* a campaign contribution, a looser "*quid pro quo*" standard applies, in which the linkage does not have to be proven to have been "explicit" (or "express").

The Second Circuit, for instance, explained that this is the law in *United States v. Ganim*, 510 F.3d 134 (2nd Cir. 2007) (Sotomayor, J.). The Second Circuit understood *McCormick* as holding that "proof of an express promise is necessary when the payments are made in the form of campaign contributions." *Ganim*, 510 F.3d at 142. The Court continued, *id.* at 143, that it had "harmonized" *McCormick* and *Evans* by recognizing that outside the campaign contribution context there still must be proof of a *quid pro quo*, but not an explicit one. *Evans* "modified [the *quid pro quo*] standard in non-campaign contribution cases," *Ganim*, 510 F.3d at 143, such that in cases that do not involve campaign contributions, the *quid pro quo* can be "implied" as contrasted with express. *Id.*

The Ninth Circuit followed *Ganim* in this regard, and stated this understanding comprehensively, in *United States v. Kincaid-Chauncey*, 556 F.3d 923, 936-37 (9th Cir. 2009): for campaign contributions there must be proof of an "express" *quid pro quo* promise in order to make out a crime, but for cases that do not involve contributions the *quid pro quo* may be implicit. The Sixth Circuit is in the same

camp, as reflected in its discussion in *United States v. Abbey*, 560 F.3d 513, 517-18 (6th Cir. 2009).

The Eleventh Circuit, by contrast, takes *Evans* as having diluted the "explicit *quid pro quo*" standard in *all* cases—those involving campaign contributions as well as those involving personal payments to the official. Based on that understanding, the Eleventh Circuit held that *McCormick*'s "explicit *quid pro quo*" standard does *not* require proof of an "express" promise or agreement linking the contribution and official action. [16a-17a, 561 F.3d at 1226]. In the Eleventh Circuit's view, there can be conviction if there is proof from which the jury could *infer* an *unspoken state of mind*, on the part of the official and the contributor, linking the contribution and the action. "Explicit," declared the Eleventh Circuit, does not mean "express"; and so the official and the contributor can be convicted and jailed even where there was no promise or agreement spoken. [16a, 561 F.3d at 1225-26].

The Eleventh Circuit suggested that its view of *Evans* is supported by Sixth Circuit precedent. [17a-18a, 561 F.3d at 1226, citing and quoting *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) ("*Evans* instructed that by 'explicit' *McCormick* did not mean express")]. But in fact not even the Sixth Circuit believes that, anymore. Instead, as noted above, the Sixth Circuit is among those Courts that treats *Evans* as having adopted a less stringent, non-"explicit," *quid pro quo* standard for cases that do *not* involve campaign contributions. Cases involving campaign contributions still require the heightened showing, one that is not diluted by *Evans*. *See Abbey*, 560 F.3d at 517 (treating *Blandford*'s analysis of *Evans* as dictum); *id.* at 517 ("Not all quid pro quos

are made of the same stuff. . . . *Evans* modified the standard in non-campaign contribution cases . . ."); *id.* at 517-18 (reflecting that in non-campaign contribution cases, the difference is that the *quid pro quo* agreement does not have to be explicit).

Upon full review, the Court should firmly reject the Eleventh Circuit's broad reading of *Evans*. The single sentence about *McCormick*, in the Court's opinion in *Evans*, is on its face not a comment on the "explicit" aspect of *McCormick*'s "explicit *quid pro quo*" holding. It is not about what "explicit" means, or whether explicitness is required. The Court was talking in *Evans* about something entirely different, about an argument that could be answered by saying that "*fulfillment* of the *quid pro quo* is not an element of the offense." *Evans*, 504 U.S. at 268 (emphasis supplied). The issue at hand was about fulfillment, or consummation, of an exchange—not about how explicit the planned exchange had to be.

The briefs in *Evans* confirm this. The argument that Evans was making, to which the Court was responding, was twofold: first that the inquiry had to focus on the official's intent rather than the payor's, and second that the official did not commit a crime until he actually attempted to follow through with official action. *See* Brief of Petitioner in *Evans*, 1990 U.S. Briefs 6105, 1991 U.S. S. Ct. Briefs LEXIS 492, *74-78. Responding, the United States wrote a passage that this Court adopted nearly verbatim in its opinion as quoted above. Brief of United States in *Evans*, 1990 U.S. Briefs 6105, 1991 U.S. S. Ct. Briefs LEXIS 493, *51.

As a matter of proper interpretation of precedent, therefore, the Eleventh Circuit's broad view of *Evans*, as vitally affecting the meaning of "explicit," is wrong.

Moreover, the Eleventh Circuit's view of the word "explicit"—that it does not mean "express"—is quite idiosyncratic as a matter of ordinary language.[3] And in taking the view that the word "explicit" merely requires that the *quid pro quo* agreement be about a "specific" action, 17a-19a, 561 F.3d at 1226-27, the Eleventh Circuit was merely taking the side of the dissent in *McCormick*. *See McCormick*, 500 U.S. at 282-83 (Stevens, J., dissenting) (contending that an "implicit" linkage between a contribution and a "specific" action was enough to constitute a crime). Likewise, the Eleventh Circuit's view cannot be squared with *McCormick*'s further description of the cases in which a crime has occurred: "In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id.*, 500 U.S. at 273. Here, even on the description by the Court of Appeals, there is simply no evidence that Governor Siegelman ever "assert[ed]" any such thing. Having in mind an intention to do something, but not speaking it directly and out loud as a promise, does not count as "assert[ing]" that one will do it. In short, the decision below represents exactly the view that this Court rejected in *McCormick*.

But whether or not the Court already sees the Eleventh Circuit as being wrong about what the *McCormick* standard is, there can be no doubt that the Eleventh Circuit has starkly disagreed with other Circuits on the question. Nor can there be any doubt that Governor Siegelman stands convicted by virtue of a standard that no reasonable person would have

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[3] The Oxford English Dictionary, for instance, defines "express" as "stated explicitly." <http://www.askoxford.com/concise_oed/express_3?view=get>. Merriam-Webster lists the words as synonyms. <http://www.merriamwebster.com/dictionary/explicit>.

known, in advance, to be the law; this in itself raises serious questions of fairness.

The question presented here is important not only to Governor Siegelman, but also to all public officials who raise or receive campaign contributions and to all citizens who contribute. Every interested person should be able to know in advance where the line is, between politics and crime. Raising campaign funds, and donating to campaigns, are not only a necessity in our modern democracy; beyond that, these activities are expressions of constitutional rights under the First Amendment. (They can be regulated to a degree, of course, but still they are of constitutional importance). Likewise, seeking governmental action is itself a constitutional right under the First Amendment's "petition" clause. And officials must take action, including action that affects contributors. If the definition of relevant crimes is different from one Circuit to the next, and if the definitions are uncertain, then officials and citizens take all these actions at their peril. The exercise of constitutional rights will be chilled by this lack of clarity.

Moreover, in defining the relevant standard, the courts likewise define the degree of discretion that prosecutors enjoy; and discretion that is wider, in this context, is more dangerous. The Eleventh Circuit's standard, by allowing prosecutors to seek indictment based not on words that are spoken but on states of mind that are inferred, grants an enormous amount of discretion. It gives prosecutors the authority to decide which governmental officials are to be trusted to have made decisions for legitimate reasons, and which ones should be prosecuted because their thoughts are believed to have been inappropriate. And this heightened degree of prosecutorial discre-

tion is dangerous not only because it can lead to unjust prosecutions, but because it can undermine public confidence in the prosecutorial function. When the line between law and politics is unclear, the public does not and cannot have faith that all prosecutors choose their targets legitimately.

For these reasons—because there is disagreement among the Circuits, and because the question is important to our democracy—the Court should grant review to clarify the *McCormick* standard.

One might perhaps argue, as a reason for denying review in this case, that *McCormick* was a Hobbs Act case and that this case is not. But that distinction should not stand in the way of review. There are good reasons to believe that the same standard should apply,[4] and to our knowledge no Circuit has denied it. Even the Eleventh Circuit, below, did not deny that the *McCormick* standard should be the same as to these statutes as it is in the Hobbs Act context. The Court of Appeals stopped just short of so holding, but recognized the force of the point. [15a, 561 F.3d at 1225]. The *McCormick* standard is squarely at issue here, just as it has been in the cases from other Circuits that have interpreted *McCormick* differently. There is a Circuit split on what *McCormick* means, whether under the Hobbs Act or other statutes.[5]

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[4] *See, e.g., United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) (recognizing that extortion and bribery are but "different sides of the same coin" and that it would therefore make sense for the same *McCormick* standard to apply).

[5] As we noted above, a significant part of the reasoning of *McCormick* was a "clear statement" rule, an expectation that Congress would speak explicitly if it wished to adopt a standard that would sweep more campaign-contribution cases into the

One might conceivably argue, in opposition to certiorari, that this case is slightly different from some other *McCormick* cases, since this case involves a contribution to a referendum campaign instead of a campaign for elective office. But if this distinction mattered at all, it would matter in the sense of urging even *more* protection for the contributor and the official in this very case, not less. As the Eleventh Circuit noted below,

> Arguably, the potential negative impact of these statutes on issue-advocacy campaigns is even more dangerous than it is to candidate-election campaigns. Issue-advocacy campaigns are a fundamental right in a free and democratic society and contributions to them do not financially benefit the individual politician in the same way that a candidate-election campaign contribution does. Defendants assert, and we do not know otherwise, that this is the first case to be based upon issue-advocacy campaign contributions.

[13a, 561 F.3d at 1224 n.13]. Therefore, this distinction should not stand in the way of certiorari. Issue-

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zone of criminal prohibition. *Id.* 500 U.S. at 272-73. Neither the "honest services" statute nor § 666 contains anything remotely approaching a "clear statement" in this respect. The "honest services" law is clear as mud in many respects, including this one. And § 666 contains the crucial, but unclear, limitation that it prohibits actions only if they are done "corruptly." Without that textual limitation, nearly *any* campaign contribution motivated by a desire to "reward" a specific official action that the donor thought to have been a good idea would, bizarrely enough, be a crime. "Corruptly" is therefore an essential, but unfortunately unclear, part of the statute; the *McCormick* standard is the best interpretation of what it means, in the context of campaign contributions that are alleged to have been bribes.

advocacy or referendum campaigns are a major part of the current political landscape in many states; the law about them should be clear, no less than the law regarding campaigns for elective office.

Likewise, one might conceivably label as *dicta* the discussion of the standard applicable to campaign contribution cases, in *Ganim*, *Kincaid-Chauncey*, and *Abbey*, since those decisions were primarily concerned with fact scenarios that did *not* involve campaign contributions. But such an argument would be misplaced as grounds for opposing certiorari. In those Circuits that have said in published opinions that proof of an "express" *quid pro quo* promise is required in a campaign contribution case, surely no United States Attorney could justifiably seek an indictment and try for a conviction on a looser standard. Therefore, in practice, the stark conflict between the law in the Eleventh Circuit, and the law in Circuits such as the Second, Sixth, and Ninth, will not go away. Evidence and potential inferences that can lead to a conviction and sentence in the Eleventh Circuit will not lead even to an indictment in some other Circuits. It is an immediate problem, and a problem that will not disappear, and a problem that should not be allowed to linger.

But even if there were not a division among the Circuit Courts, still certiorari would be appropriate because the issue is so important and because the decision below is so hard to square with *McCormick* itself. This Court in *McCormick* required an "explicit *quid pro quo*," an "explicit promise or undertaking" by the official, to make receipt of a contribution a crime. This Court in *McCormick* rejected the dissenters' view that an implicit exchange of the contribution for some specific action was enough to constitute

a crime. The Eleventh Circuit has somehow found itself able to adopt the dissenters' view, and to declare that a promise or undertaking can be "explicit" when it is only implicit. This gives prosecutors extraordinary discretionary power to target officials, or not, for actions that are quite routine. The Court should grant review in order to return clarity to this area of law.[6]

B. On the second question presented, the decision below is contrary to the text of § 1512(b)(3), and contrary to the decisions of other Circuits.

The second question presented, about the reach of 18 U.S.C. § 1512(b)(3), also deserves this Court's full consideration. This could be viewed as resolving a split in lower court authority, as we will show. But frankly the question is so easily answered—and the Eleventh Circuit's treatment of the issue is so devoid of reasoned attention to the question—that it could also be viewed as a necessary exercise in error-correction. The bottom line is that Governor Siegelman stands convicted under § 1512(b)(3) despite the fact

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[6] Even if this Court ultimately agreed with the Eleventh Circuit that an unspoken state of mind was enough for conviction in this sort of case, still the Court should reverse Governor Siegelman's conviction based on due process fairness and notice concerns; given the state of the law at the time, he could not have known that the law allowed conviction without an actually-stated express *quid pro quo*. Moreover, even if the Court adopted a standard that allowed conviction based on unspoken states of mind, the Court should reverse Governor Siegelman's conviction because of the insufficiency of the evidence; and in that respect, the Court should scrutinize the evidence at or near a *de novo* level of scrutiny (without deference to the jury's actual or potential conclusions) because of the First Amendment concerns involved in the case.

that (even accepting the Eleventh Circuit's portrayal of the facts) there was not a bit of evidence that he had the "intent" that the statute covers.

The Court of Appeals upheld the conviction on this count, portraying the evidence as allowing the inference that Governor Siegelman engaged in an effort to "cover up" an earlier, allegedly improper, payment from Lanny Young.[7] This "coverup," according to the Court of Appeals, consisted of the creation of documents, including the check that was the gravamen of this count. In what sense was it allegedly a "coverup"? According to the Court of Appeals, it was in the sense that it was an effort to convey the impression that (rather than giving money to Governor Siegelman) Young had merely lent money to Bailey to buy the motorcycle.

The theory of the prosecution was that Governor Siegelman persuaded Bailey to write the check, and that he and Bailey misled Bailey's counsel about the nature of it. That is how the prosecution sought to meet the first element of the statute, which requires proof of persuasion, misleading, or other sorts of acts. On full review, we believe the Court would see that neither of those facts can fairly be inferred from the evidence; there was, for instance, not actually any evidence that Governor Siegelman even asked, much less persuaded, Bailey to write this check.

But whether the charge was that he "persuade[d]" or "engage[d] in misleading conduct," the statute also required proof of a particular intent: the intent to "hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of

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[7] As noted above, the jury rejected the charges relating to the earlier payment itself.

information relating to the commission or possible commission of a Federal offense."

This statute, in other words, prohibits efforts to stop or keep people (by persuasions, threats, or trickery) from providing information to law enforcement, or at least to slow them down from doing so. That is the plain meaning of the "intent to hinder, delay or prevent" portion of the statute. There are other statutes that cover, more generally, improper attempts to influence what people say in certain contexts. *See, e.g.*, 18 U.S.C. § 1512(b)(1). Those statutes might cover efforts to induce people to give information to law enforcement that they would not otherwise have given, but this is not such a statute; Congress decided not to use the word "influence" in § 1512(b)(3). There are also other obstruction statutes that cover misleading acts involving documents in certain contexts. *See, e.g.*, 18 U.S.C. § 1512(c)(1). There are other obstruction statutes that are drawn as catch-all provisions, but only in contexts that are inapplicable here. *See* 18 U.S.C. § 1512(c)(2) (catch-all provision regarding corruptly influencing an "official proceeding"). Congress knows how to write the obstruction statutes it wants, to cover the behavior it wants to criminalize, as broadly or narrowly as it chooses.

Rather than focusing on the words of the "intent" clause of the statute, the Court of Appeals was satisfied with its conclusion that the intent was to engage in a "cover up." But that is not what the statute demands. Some "coverups," it is true, might involve keeping witnesses from conveying information to law enforcement. But not all "coverups" are of that sort; there can be coverups of other types. "Coverup" is not a legal term, under federal law; it is a colloquial term that covers many sorts of things. If there was a

"coverup" in this case, was it of the sub-species that is based on keeping people from telling law enforcement what they know? The Court of Appeals did not say, and it cited no evidence that it was.

The Court of Appeals thus went astray by failing to adhere to the words of the statute, and in particular its clause about the required "intent." The Court of Appeals allowed the colloquialism "coverup" to substitute for adherence to this portion of the statute's plain text. In that, the Court of Appeals departed from the holdings of other Circuits. Consider, for instance, *United States v. Hertular*, 562 F.3d 433 (2nd Cir. 2009). There, the Second Circuit recognized that a conviction under this statute "requires 'a specific intent to interfere with the communication of information'." *Id.* at 443, *citing United States v. Genao*, 343 F.3d 578, 586 (2d Cir. 2003). By contrast, as recognized in *Hertular*, an intent to "hinder or prevent . . . simply the filing of an indictment" is *not* enough to come within the statute. 562 F.3d at 443. It is the intent to hinder, delay or prevent communication to law enforcement—*not* a perceived intent to "cover up" or avoid indictment in a more generic sense—that makes this crime.

The Eleventh Circuit did not suggest that there was evidence to come within the actual words of the "intent" clause of the statute. Nor did the prosecution argue that any evidence supported a finding of such particular intent, for that matter. There is absolutely no suggestion, for instance, that Bailey would have given information to law enforcement, such that Governor Siegelman formulated the intent to hinder, delay or prevent him from doing so. Nor is it plausible to suggest that Governor Siegelman had that intent as to Bailey's counsel, the person

allegedly misled. There is simply no way that Bailey's own lawyer would have gone to law enforcement to inculpate Bailey and Siegelman with information that he possessed, such that Bailey and Siegelman would have misled him in order to stop him; that is the antithesis of a lawyer's role. Even the Court of Appeals was unwilling to make such far-fetched suggestions. But only that sort of far-fetched suggestion, or something else equally lacking in evidentiary foundation and unmentioned by the Court of Appeals, could bring the case within § 1512(b)(3), once one focuses (as the Court of Appeals did not) on the words of the statute.[8]

So as to avoid possible confusion, we note that the issue we are raising here is separate from some other issues that often arise in the caselaw under § 1512(b)(3). There is sometimes debate, for instance, about how much proof there must be of a defendant's intent to interfere with a *federal* as opposed to *state* investigation. And there is sometimes debate about whether state law enforcement officials can count as the people who are misled, as the people whose communications are intended to be hindered.[9]

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[8] The indictment, notably, had tracked the "intent" prong of the statute: the charge was that Governor Siegelman's intent was to hinder, delay or prevent either Bailey, or Young, or Bailey's lawyer from communicating to the FBI. But as noted in the text above, neither the Court of Appeals nor the prosecution's appellate team claimed that any evidence at trial actually proved such intent.

[9] The United States sometimes does frame indictments so as to allege that law enforcement officials are the people whose communications to other law enforcement officials are intended to be hindered, delayed or prevented. The United States thereby tries, in some cases, to have the statute cover some attempts to "cover up" things by misleading investigators; the

This case is simpler than those, and should not be confused with them. This case involves a stark absence of proof of *any* intent to hinder, delay, or prevent communications to law enforcement. The absence of such proof was so stark that the Court of Appeals did not claim that there was such proof; it rested instead on the legally erroneous view that it was enough to find an intent to "cover up."

Thus only by departing from the plain text of the statute and from decisions like *Genao* could the Eleventh Circuit affirm Governor Siegelman's conviction on this count. For these reasons, we respectfully submit that this question 2 is deserving of certiorari even on its own. But most assuredly, if the Court grants the writ as to question 1, then the Court should grant the writ as to question 2 as well.

We recognize that the error of the Court of Appeals on question 2 was perhaps a matter of error caused by inattention to careful legal reasoning, as opposed to being a conscious disagreement on a reasonably disputable point of law. But this should not lead to a denial of review. Even though this Court does not often grant review for error-correction, it should do so in this case. Otherwise there would be the troubling likelihood of a grave injustice: that Governor Siegel-

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theory in such cases is that the "coverup" keeps the investigators from learning inculpatory facts and thus hinders them from communicating such inculpatory facts to others in law enforcement. This case does not require the Court to opine on the validity of that workaround. If the workaround is ever valid, it is only in cases where the indictment alleges it, and the jury finds it. Here, as noted above, the indictment alleged that the intent was to hinder, delay, or prevent communications by Bailey, Young, or Bailey's lawyer—not to hinder, delay, or prevent communications within law enforcement.

man would finally obtain exoneration on the core charges against him, only to face imprisonment on an afterthought charge that was not actually supported by the law and the evidence.

CONCLUSION

By granting review, this Court would have the opportunity to right an injustice, to free a man who has committed no crime, and to clarify the law in a manner that will be important to all candidates, elected officials, and politically engaged citizens. For the foregoing reasons, this Court should grant review.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-13163
D.C. Docket No. 05-00119-CR-F-N

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DON EUGENE SIEGELMAN, RICHARD SCRUSHY,
Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Alabama

(March 6, 2009)

Before EDMONDSON, Chief Judge, TJOFLAT and HILL, Circuit Judges.

PER CURIAM:

Don Eugene Siegelman is the former Governor of Alabama. Richard Scrushy is the founder and former Chief Executive Officer of HealthSouth Corporation, a major hospital corporation with operations throughout Alabama. The defendants were convicted of federal funds bribery, in violation of 18 U.S.C. § 666(a)(1)(B), and five counts of honest services mail fraud and conspiracy, in violation of 18 U.S.C. §§ 1341, 1346, and 18 U.S.C. § 371. Siegelman was

also convicted of obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3).

The defendants' bribery convictions were based on allegations that they made and executed a corrupt agreement whereby Scrushy gave Siegelman $500,000 in exchange for Siegelman's appointing him to Alabama's Certificate of Need Review Board (the "CON" Board). The honest services mail fraud convictions incorporated the same bribery allegations, but also alleged that Scrushy used the CON Board seat obtained from Siegelman to further HealthSouth's interests. Siegelman's obstruction of justice conviction is based on allegations that he corruptly influenced another to create a series of sham check transactions to cover up a "pay-to-play" payment to him.[1]

This is an extraordinary case. It involves allegations of corruption at the highest levels of Alabama state government. Its resolution has strained the resources of both Alabama and the federal government.

But it has arrived in this court with the "sword and buckler" of a jury verdict. The yeoman's work of our judicial system is done by a single judge and a jury. Twelve ordinary citizens of Alabama are asked to sit through long days of often tedious and obscure testimony and pore over countless documents to decide what happened, and, having done so, to apply to these facts the law as the judge has explained it to them. And they do. Often at great personal sacrifice. Though the popular culture sometimes asserts otherwise, the virtue of our jury system is that it most often gets it right. This is the great achievement of

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[1] The obstruction of justice allegations involved conduct unrelated to the Siegelman-Scrushy bribery, mail fraud and conspiracy charges.

our system of justice. The jury's verdict commands the respect of this court, and that verdict must be sustained if there is substantial evidence to support it. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

Furthermore, to the extent that the jury's verdict rests upon their evaluations of the credibility of individual witnesses, and the reasonable inferences to be drawn from that testimony, we owe deference to those decisions. In our system, the jury decides what the facts are, by listening to the witnesses and making judgments about whom to believe. This they have done, and, though invited to do so,[2] we shall not substitute our judgment for theirs.

This is not to say that the judgment below is inviolable. Our duty as an appellate court is to answer properly presented questions from the parties in the case as to whether the law was correctly interpreted and applied by the district court. Juries apply the law as the judge instructs them, and the defendants' lawyers assert that there were errors in those instructions. Defendants also contend that there were other legal mistakes committed during the course of this trial. With this in mind, we have reviewed the claims of legal error in the proceedings below, and our opinion as to their merit follows. First, however, we recount the facts as the jury found them.[3]

I.

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[2] The defendants assert that this is a case in which we owe no deference to the jury's findings of fact, but we disagree.

[3] Where the jury need not have found a particular fact to be established in order to reach their verdict, we indicate who testified to that fact.

Don Siegelman was elected Governor of Alabama in 1998 on a campaign platform that advocated the establishment of a state lottery to help fund education in Alabama. After his election, he established the Alabama Education Lottery Foundation (the "Foundation") to raise money to campaign for voter approval of a ballot initiative to establish a state lottery. Darren Cline, the Foundation's fundraising director, testified that Siegelman "called the shots" on the lottery campaign. The lottery initiative was eventually defeated in a referendum held in October of 1999.

On March 9, 2000, the Foundation borrowed $730,789.29 from an Alabama bank in order to pay down debt incurred by the Alabama Democratic Party for get-out-the-vote expenses during the lottery campaign. This note was personally and unconditionally guaranteed by Siegelman.[4]

Richard Scrushy, the CEO of HealthSouth had served on the CON Board under three previous governors of Alabama. The CON Board is an arm of the State Health Planning and Development Agency and exists to prevent unnecessary duplication of healthcare services in Alabama. The Board determines the number of healthcare facilities in Alabama through a process that requires healthcare providers to apply for and obtain a certificate of a healthcare need before opening a new facility or offering a special healthcare service. The CON Board decides which healthcare applications will be approved for an announced healthcare need, choosing between competing applications and ruling on objections filed

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[4] There was another personal guarantor, but each was individually liable.

by an applicant's competitor. The Governor of Alabama has sole discretion to appoint the members of the CON Board, who serve at his pleasure.[5] Scrushy had supported Siegelman's opponent in the just prior election.

Nick Bailey was one of Siegelman's closest associates and had worked on Siegelman's campaign for governor. Cline testified that "whatever [Bailey] told me that the Governor wanted was what the Governor said." Cline also testified that "if the Governor wanted to get something done, then [Bailey] went ahead—blindly went ahead and did it."

Bailey testified that, after Siegelman's election in 1998, Siegelman met with Eric Hanson, an outside lobbyist for HealthSouth, and told Hanson that because Scrushy had contributed at least $350,000 to Siegelman's opponent in the election, Scrushy needed to "do" at least $500,000 in order to "make it right" with the Siegelman campaign. Bailey testified that Siegelman was referring to the campaign for the lottery initiative, and that Hanson was to relay this conversation to Scrushy. Bailey also testified that, in another conversation, Hanson told Bailey that Scrushy wanted control of the CON Board.

Mike Martin is the former Chief Financial Officer of HealthSouth. He testified that having influence over the CON Board was important to Scrushy and HealthSouth because it determined the number of healthcare facilities in the state, thereby affecting HealthSouth's ability to grow. He testified that Scrushy told him that to "have some influence or a spot on the CON Board," they had to help Siegelman

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[5] Three of the nine seats on the Board are reserved for health care industry providers.

raise money for the lottery campaign. Scrushy said that if they did so, "[they] would be assured a seat on the CON Board." Martin testified, "[W]e were making a contribution . . . in exchange for a spot on the CON Board."

Bailey testified that lobbyist Hanson "made it clear to him that if Mr. Scrushy gave the $500,000 to the lottery campaign that we could not let him down" with respect to the CON Board seat. Bailey also testified that he "reminded the Governor periodically of the conversations that [Bailey] had with Eric Hanson and the conversations that the Governor had with Eric Hanson about what Mr. Scrushy wanted for his contributions, and that was the CON Board."

Martin also testified that Scrushy told him that HealthSouth could not make the payment to the lottery campaign, nor could he do it personally because "we [HealthSouth] had not supported that and that his wife, Leslie, was against the lottery, and it would just look bad if HealthSouth made a direct contribution to the lottery, so we needed to ask—he instructed me in particular to ask our investment banker, Bill McGahan, from [the Swiss bank] UBS, to make the contribution."

Bill McGahan did not want to make such an "out of the norm" donation and hoped the matter would "go away." Over the next two weeks, Martin called McGahan at least once a day to ask him about the status of the UBS donation, and told McGahan that Scrushy was going to fire UBS if it did not make the contribution. Finally, Martin testified, Scrushy himself called McGahan to "put more pressure" on him to make the contribution.

McGahan testified that he did not want UBS to make such a large contribution directly, so he told Martin that he would get Integrated Health Services ("IHS") of Maryland to make the donation to the lottery campaign in exchange for UBS reducing an outstanding fee that IHS owed UBS. IHS agreed to this arrangement and donated $250,000 to the Foundation in exchange for a reduction of $267,000 in the fee it owed UBS.

The IHS "donation" was in the form of a check dated July 19, 1999, made payable from itself to the Foundation. Martin testified that Scrushy told him it was important that he, Scrushy, hand deliver the IHS check to Siegelman, so Martin delivered the check to Scrushy so that he could do so.

Some time later,[6] Siegelman and Scrushy met in Siegelman's office. Bailey testified that after Scrushy left, Siegelman showed the IHS check to Bailey and told him that Scrushy was "halfway there." Bailey asked, "what in the world is he [Scrushy] going to want for that?" Siegelman replied, "the CON Board." Bailey then asked, "I wouldn't think that would be a problem, would it?" Siegelman responded, "I wouldn't think so."

Siegelman appointed Scrushy to the CON Board on July 26, 1999—one week after the date on the IHS check.[7] Siegelman directed Bailey to contact the Board chair-designee to tell her that Siegelman wanted Scrushy to be vice-chair of the CON Board, and the Board so chose. Bailey testified that

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[6] Bailey told the FBI that Scrushy gave the check to Siegelman in a meeting on July 14, 1999, but testified at trial that he did not remember exactly when the meeting was.

[7] Seven other Board members were appointed that day.

Siegelman made Scrushy vice-chair "[b]ecause [Scrushy] asked for it." Scrushy stayed on the Board until January of 2001, at which time Siegelman appointed Thom Carman, HealthSouth's vice-president, to the remainder of Scrushy's term. Siegelman subsequently reappointed Carman to a full term. While Carman was on the Board, HealthSouth successfully applied for and received Certificates of Need for a mobile PET scanner and a rehabilitation hospital.

Darren Cline, the Foundation's fundraising director, testified that Siegelman gave him the IHS check and told him it was from Scrushy. Cline was concerned about the amount of the donation from one person, and Siegelman told him to hold the check. In November of 1999, however, at Siegelman's direction, Bailey retrieved the check and opened a new checking account in the Foundation's name at a Birmingham bank. Bailey made an initial deposit of $275,000—the $250,000 IHS check and a $25,000 check from another company. Cline was never told.

On March 9, 2000, the Foundation borrowed, from the same Birmingham bank, $730,789.29 to repay the Alabama Democratic Party's debt in connection with the lottery initiative and Siegelman guaranteed the loan. At that time, the Foundation had over $447,000 in its checking account at the bank, $250,000 of which had come from the IHS check deposited in November of 1999. On March 13, 2000, $440,000 was debited from the account to pay down the Foundation's loan.

In May, Siegelman and Bailey traveled to HealthSouth's headquarters in Birmingham, where Siegelman met privately with Scrushy in Scrushy's office. At that meeting, Scrushy gave Siegelman a check

issued by HealthSouth for $250,000 payable to the Foundation.[8] On May 23, 2000, the $250,000 check was applied directly against the Foundation's loan balance.

The Foundation was required to disclose contributions received and expenditures made in statements filed with the Alabama Secretary of State. It failed to file timely any disclosure regarding any funds received until July of 2002, after Alabama newspapers questioned whether the financial dealings between the Foundation and the Alabama Democratic Party had been properly reported and the Secretary of State's Office had written a letter to the state Attorney General's Office about the Foundation's non-disclosure of the payoff of the Democratic Party's campaign loan. All funds received were then reported.

Lanny Young was a long-time business associate of Siegelman's who testified that he was part of a "pay-to-play" arrangement with Siegelman existing over many years. He testified that he would provide money, campaign contributions, and other benefits in return for official action, as needed, that benefitted Young's business interests. He testified that in January of 2000, Siegelman asked him for $9,200 to buy a motorcycle. The evidence was that Siegelman had already purchased the motorcycle. Young testified that he and Bailey worked out the details for the transaction.

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[8] HealthSouth's political contributions coordinator testified that she did not know about the donation until she read about it in the newspaper. The Foundation's fundraising director testified that he was not present when Scrushy gave Siegelman either of the checks.

Bailey testified that he did not want Young to give the money directly to Siegelman, so Bailey told Young to write the check to him, Bailey, which he deposited into his own account. He then wrote a check to Lori Allen, Siegelman's wife, which he gave to Siegelman and which was deposited into Siegelman's bank account that same day. There was testimony that a check written to the IRS for fourth quarter estimated taxes would not have cleared the account but for the $9200 deposit.

By June of 2001, Siegelman was well-aware of the federal-state investigation into the Foundation's finances and Siegelman's dealings with Young. Bailey and Young each testified that, in an effort to cover up Young's $9,200 payment to Siegelman, Bailey gave Young a check for $10,503.39, on which he noted "repayment of loan [the $9,200] plus interest" in order to make it appear that he had borrowed the $9,200 from Young. Bailey also wrote a check to Siegelman for $2,973.35 with the notation "balance due on m/c" to provide a reason for his borrowing money from Young, which was to purchase the motorcycle from Siegelman. Bailey testified that he did not borrow the money to buy the motorcycle, but that Young's $9,200 had gone through him to Siegelman and "we used the motorcycle to cover it up." Bailey testified that Siegelman was aware of and approved Bailey's writing of the $10,503.39 check to Young.

Bailey testified that he gave Siegelman the $2,973.35 check at the office of Siegelman's attorney, who, along with Bailey's own attorney, was present for the transfer. Neither lawyer was told that the purpose of the transaction was part of the coverup of the $9,200 payment from Young to Siegelman. Sie-

gelman accepted the check, and provided Bailey with a bill of sale for the motorcycle, which the attorneys helped finalize. Bailey testified that he lied about the transaction to the lawyers, that he and Siegelman knew that the federal investigation was going on, and that he later lied to federal investigators about the transaction to protect himself and Siegelman.

II.

On December 12, 2005, a grand jury returned a second superseding indictment against Siegelman and Scrushy and two other defendants.[9] Both Siegelman and Scrushy were charged with federal funds bribery, honest services conspiracy and honest services mail fraud.[10] Siegelman was also charged with multiple counts of racketeering conspiracy, racketeering, honest services wire fraud, obstruction of justice and extortion.

Trial on the indictment began on May 1, 2006. On June 29, 2006, the jury convicted Siegelman and Scrushy on the bribery, conspiracy and honest services mail fraud counts, and Siegelman was convicted of one count of obstruction of justice. The jury acquitted Siegelman on the remaining twenty-two counts. The other two defendants were acquitted on all counts against them.

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[9] The superseding indictment replaced an earlier version of the indictment.

[10] The federal funds bribery statute criminalizes the taking of a bribe by an official of a state agency that receives over $10,000 in federal funds annually. 18 U.S.C. § 666. Honest services mail fraud criminalizes the mailing of a letter in connection with a scheme to defraud a state agency of an official's honest services in the performance of his official duties. 18 U.S.C. §§ 1341 and 1346.

Siegelman and Scrushy were each sentenced to approximately seven years in federal prison.[11]

On appeal, Siegelman and Scrushy together allege nine errors in the trial proceedings below. With respect to the bribery, conspiracy and honest services mail fraud counts against them, defendants assert that the court's instructions erroneously failed to require the jury to find a *quid pro quo* in order to convict; that, in any event, there was insufficient evidence of any *quid pro quo*; that the bribery counts were barred by the statute of limitations; and that the trial court erroneously admitted hearsay used to convict them on these counts. Defendants also allege that there was juror misconduct requiring the grant of a new trial and that the procedures used to select their grand and petit juries violated the Jury Selection and Services Act of 1968 and the Constitution. Siegelman contends that there was insufficient evidence that he obstructed justice and that the district court abused its discretion in sentencing him by upwardly departing from the Sentencing Guidelines. We shall consider each of these allegations of error in turn.

III.

1. Bribery, Conspiracy and Honest Services Mail Fraud Counts.

A. Jury Instructions

The bribery statute under which defendants were convicted makes it a crime for a state official to corruptly agree to accept anything of value from

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[11] Siegelman and Scrushy were denied bond pending appeal, but a panel of this court subsequently released Siegelman pending resolution of this appeal.

another person "intending to be influenced" in that person's favor in an official action. 18 U.S.C. § 666(a)(1)(B). The honest services mail fraud statute criminalizes the use of the mails to execute a scheme to defraud another of the right to a public official's honest services. 18 U.S.C. §§ 1341, 1346. The conspiracy statute prohibits two or more persons from conspiring to commit a federal offense. 18 U.S.C. § 371.

The bribery, conspiracy and honest services mail fraud convictions in this case are based upon the donation Scrushy gave to Siegelman's education lottery campaign.[12] As such, they impact the First Amendment's core values—protection of free political speech and the right to support issues of great public importance. It would be a particularly dangerous legal error from a civic point of view to instruct a jury that they may convict a defendant for his exercise of either of these constitutionally protected activities.[13] In a political system that is based upon raising private contributions for campaigns for public office

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[12] Although the conspiracy and mail fraud counts alleged a broader scheme for Scrushy to self-deal once on the Board, these counts also incorporated the allegations of an agreement between Siegelman and Scrushy to exchange money for the seat on the Board.

[13] Arguably, the potential negative impact of these statutes on issue-advocacy campaigns is even more dangerous than it is to candidate-election campaigns. Issue-advocacy campaigns are a fundamental right in a free and democratic society and contributions to them do not financially benefit the individual politician in the same way that a candidate-election campaign contribution does. Defendants assert, and we do not know otherwise, that this is the first case to be based upon issue-advocacy campaign contributions.

and for issue referenda, there is ample opportunity for that error to be committed.

The Supreme Court has sought to protect against this possibility by requiring more for conviction than merely proof of a campaign donation followed by an act favorable toward the donor. *McCormick v. United States*, 500 U.S. 257 (1991). In reviewing a Hobbs Act prosecution, the federal crime of extortion under color of official right—demanding a campaign donation in return for taking some favorable official action—the Court said:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private

> contributions or expenditures, as they have been from the beginning of the Nation.

Id. at 272.

To avoid this result, the Court made clear that only if "payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act, are they criminal." *Id.* at 273 (emphasis added). The Court quoted the Court of Appeals for the Fifth Circuit, which had said that:

> A moment's reflection should enable one to distinguish, at least in the abstract, a legitimate solicitation from the exaction of a fee for a benefit conferred or an injury withheld. Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act.

Id. (quoting *United States v. Dozier*, 672 F.2d 531, 537 (5th Cir. 1982)).

While the Court has not yet considered whether the federal funds bribery, conspiracy or honest services mail fraud statutes require a similar "explicit promise," the Seventh Circuit Court of Appeals has observed that extortion and bribery are but "different sides of the same coin." *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993).[14]

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[14] We acknowledge, as the defendants point out, that several district courts, in unpublished opinions, have extended the McCormick rationale to the bribery and honest service statutes. The government points to no contrary authority, relying instead on inapposite authority not involving campaign contributions.

The district court agreed to instruct the jury that they could not convict the defendants of bribery in this case unless "the defendant and the official agree that the official will take specific action in exchange for the thing of value." (emphasis added). This instruction was fashioned by the court in direct response to defendants' request for a *quid pro quo* instruction, and was given in addition to the Eleventh Circuit's pattern jury instruction for federal funds bribery cases. So, whether or not a quid pro quo instruction was legally required, such an instruction was given.

Defendants, however, assert that the instruction was inadequate under *McCormick*. Defendants assert that the instruction failed to tell the jury that not only must they find that Siegelman and Scrushy agreed to a *quid pro quo*, the CON Board seat for the donation, but that this agreement had to be *express*. We disagree that *McCormick* requires such an instruction.

McCormick does use the word "explicit" when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions. It does not, however, mean *express*. Defendants argue that only "proof of actual conversations by defendants," will do, suggesting in their brief that only *express* words of promise overheard by third parties or by means of electronic surveillance will do.

But *McCormick* does not impose such a stringent standard. One year after *McCormick*, the Supreme Court approved the following jury instruction:

> However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a

> demand or acceptance does constitute a violation of the [federal extortion statute] regardless of whether the payment is made in the form of a campaign contribution.

Evans v. United States, 504 U.S. 255, 258 (1992). The Court held that the instruction "satisfies the *quid pro quo* requirement of *McCormick v. United States*." *Id.* at 268. The Court said that the "Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.*

The instruction approved in Evans required that the acceptance of the campaign donation be in return for a specific official action—a *quid pro quo*.[15] No generalized expectation of some future favorable action will do. The official must agree to take or forego some specific action in order for the doing of it to be criminal under Section 666. In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice.

But there is no requirement that this agreement be memorialized in a writing, or even, as defendants suggest, be overheard by a third party. Since the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no requirement that it be *express*. To hold otherwise, as Justice Kennedy noted in *Evans*, would allow defendants to escape criminal liability through "knowing winks and nods." 504 U.S. at 274 (Kennedy, J. concurring). *See also United States v. Blandford*, 33 F.3d 685, 696 (6th

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[15] The Latin means "something for something," Black's Law Dictionary 1282 (8th ed. 2004).

Cir. 1994) ("*Evans* instructed that by 'explicit' *McCormick* did not mean express"); *United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001); *United States v. Tucker*, 133 F.3d 1208, 1215 (9th Cir. 1998); *United States v. Hairston*, 46 F. 3d 361, 365 (4th Cir. 1995).[16]

Furthermore, an explicit agreement may be "implied from [the official's] words and actions." *Evans*, 504 U.S. at 274 (Kennedy, J., concurring). As Justice Kennedy explained:

> The criminal law in the usual course concerns itself with motives and consequences, not formalities. And the [jury] is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.

Id. See also United States v. Massey, 89 F.3d 1433, 1439 (11th Cir. 1996) (holding that bribery conviction under general federal bribery statute, 18 U.S.C. § 201, may be supported by "inferences drawn from relevant and competent circumstantial evidence").

In this case, the jury was instructed that they could not convict the defendants of bribery unless "the Defendant and official *agree* that the official will take

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[16] Nor is this court's prior holding in *United States v. Davis*, 30 F.3d 108 (11th Cir. 1994), to the contrary. In *Davis*, we acknowledged that, after *McCormick*, "an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion, and the defendant is entitled to a reasonably clear jury instruction to that effect." *Id.* at 108. We reversed Davis' conviction not only because his jury did not receive a reasonably clear instruction, but because the court in that case "informed the jury that 'a specific quid pro quo is not always necessary for a public official to be guilty of extortion.'" *Id.*

specific action in *exchange* for the thing of value." This instruction required the jury to find an agreement to exchange a specific official action for a campaign contribution. Finding these facts would satisfy *McCormick*'s requirement for an explicit agreement involving a *quid pro quo*. Therefore, *assuming* a *quid pro quo* instruction was required in this case, we find no reversible error.[17]

B. Evidence on the Bribery, Conspiracy and Honest Services Mail Fraud Convictions

1. The Bribery, Conspiracy and Related Mail Fraud Counts [18]

Defendants argue that the sole evidence of any explicit *quid pro quo* in connection with Siegelman's appointment of Scrushy to the CON Board was Bailey's testimony regarding the conversation he had with Siegelman following the meeting at which Scrushy delivered the first $250,000 check to Siegelman, and that this evidence was legally insufficient to support the jury's finding of a *quid pro quo*. We disagree.

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[17] Because the conduct charged in the conspiracy and honest services mail fraud counts incorporates the conduct alleged in the federal funds bribery counts, on which the jury was instructed to find a quid pro quo, any failure to adequately instruct the jury on a quid pro quo requirement for the conspiracy and honest services counts was harmless. *See Cupp v. Naughten*, 414 U.S. 141, 148-48 (1973) (jury instructions must be evaluated as a whole).

[18] Counts 6 and 7 charge Mail Fraud in connection with the mailings of the letters appointing (Count 6) and reappointing (Count 7) Thom Carman as Scrushy's replacement on the CON Board in connection with the bribery scheme.

Bailey testified that after the meeting, Siegelman showed him the check, said that it was from Scrushy and that Scrushy was "halfway there." Bailey asked "what in the world is he going to want for that?" Siegelman replied, "the CON Board." Bailey then asked, "I wouldn't think that would be a problem, would it?" Siegelman responded, "I wouldn't think so."

Defendants assert that this conversation shows that there was *not* an explicit or express agreement at this time between Siegelman and Scrushy. They argue that the conversation on its face indicates that, at best, there was only some vague expectation about the future. Defendants assert that Bailey's testimony shows at most that:

> Governor Siegelman knew, or at least thought, that Scrushy wanted a C.O.N. Board appointment in recognition of the contribution—and that Governor Siegelman didn't think that making such an appointment would present a problem.

According to defendants, even if the conversation between Bailey and Siegelman took place exactly as Bailey recounts, "no one can 'infer' from the alleged conversation recounted by Bailey that a true explicit promise or agreement had happened behind closed doors."

What is missing in this record, according to defendants, is any evidence of a discussion between Governor Siegelman and Scrushy to the effect of "I will make this contribution, and in exchange for this contribution you will appoint me. Are we agreed on that?" "Yes we are."[19] In the absence of such evidence,

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[19] This suggestion as to the evidence that would be sufficient is asserted in Siegelman's brief.

according to the defendants, no reasonable juror could infer an explicit agreement between Siegelman and Scrushy.

We disagree. Inferring actors' states of mind from the circumstances surrounding their conversation, from their actions, and from their words spoken at the time is precisely the province of the jury. As we noted above, "the [jury] is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor." *See Evans*, 504 U.S. at 274 (Kennedy, J., concurring). In making these judgments, jurors are presumed to use their common sense and are free to choose among reasonable constructions of the evidence. *See United States v. Mosquera*, 779 F.2d 628, 630 (11th Cir. 1986). Bailey's testimony was competent evidence that Siegelman and Scrushy had agreed to a deal in which Scrushy's donation would be rewarded with a seat on the CON Board. The jurors were free to give it a different construction, but they did not.

Furthermore, this was not the sole evidence that Scrushy bribed Siegelman. The jury was entitled to construe this conversation in the context of the substantial additional testimony they had heard regarding Scrushy's donation to the lottery campaign fund.

For example, Bailey repeatedly testified, without qualification, that Siegelman and Scrushy had an explicit agreement to exchange money for a seat on the CON Board[20] Bailey also testified that Siegelman

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[20] Defense counsel also recognized this fact. Scrushy's counsel said to Bailey on cross-examination, "I'm talking about your

met with Eric Hanson, an outside lobbyist for HealthSouth, and told him that because Scrushy had contributed at least $350,000 to Siegelman's opponent in the general election that Scrushy needed to "do" at least $500,000 in order to "make it right" with the Siegelman campaign. Bailey testified that Siegelman was referring to the campaign for the lottery initiative, and that Hanson was to relay this conversation to Scrushy. Bailey also testified that, in another conversation, Hanson told Bailey that Scrushy wanted control of the CON Board.

Martin corroborated Bailey's testimony when he stated that "[h]e [Scrushy] told me that if we raised that money, then we would have a spot on the CON Board," and "We were making a contribution . . . in exchange for a spot on the CON Board." Martin also testified that Hanson bragged about getting HealthSouth a seat on the CON Board with the help of the IHS check.

Cline testified that Siegelman told him that Scrushy was responsible for the first $250,000 check and that "there was another $250,000 that would be coming." Cline also testified that the receipt of the checks by the Foundation was not reported until after newspaper articles questioning the Foundation's finances.[21]

McGahan's testimony regarding Scrushy's solicitation of him to make the donation also supported an

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testimony that there was some exchange of official action for the payments that Mr. Scrushy gave, all right."

[21] There was testimony that all other contributions to the Foundation were similarly not reported, but the jury was free to choose the reasonable inference that the failure to report the licit contributions was to conceal the illicit ones.

inference that the donation was illicit. Loretta Skeleton, HealthSouth's lawyer, testified that, although she was responsible for HealthSouth political contributions, she was told nothing about the $500,000 donations.

Finally, the close relationship in time between the first check and Siegelman's appointment of Scrushy was also some evidence of *quid pro quo*.

In sum, the evidence was sufficient such that a reasonable juror could have concluded that Siegelman and Scrushy explicitly agreed to a corrupt *quid pro quo*, thereby proving the bribery, conspiracy and the two related mail fraud counts (Counts 6 and 7).

2. The Honest Services Mail Fraud Counts 8 and 9

Siegelman separately challenges his mail fraud convictions on Counts 8 and 9 of the indictment, each of which charged that he caused a mailing that helped to execute a scheme between himself and Scrushy to deprive the State of Alabama of its right to their honest services as the Governor and as a member of the CON Board. Counts 8 and 9 alleged that the scheme included not only the exchange of the seat on the CON Board for the $500,000 lottery campaign, but also that Scrushy "would and did use his seat on the CON Board to attempt to affect the interests of HealthSouth and its competitors," and that Scrushy "would and did offer things of value to another Board member to attempt to affect the interests of HealthSouth and its competitors." Although Scrushy was not on the Board when the alleged self-dealing occurred the indictment charged that it was part of the scheme that Siegelman and Scrushy "orchestrated Scrushy's replacement on the

Board by another person employed by HealthSouth." The mailings charged in connection with these allegations were letters sent by the Board to HealthSouth, notifying it that it had been awarded Certificates of Need in connection with the rehabilitation hospital (Count 8) and the PET scanner (Count 9). Siegelman claims that the evidence at trial was insufficient to support his knowing participation in this alleged scheme.[22]

The evidence at trial was that Scrushy resigned from his seat on the Board in January of 2001 and that, the next day, Siegelman appointed Thom Carman, HealthSouth vice-president, to the remainder of the term. When Scrushy's term expired in July, Siegelman reappointed Carman.

While on the Board, Carman employed another member of the Board, Tim Adams, to prepare the application for the PET scanner, paying him $8000 to do so.[23] There was also testimony that Adams was paid another $3000 for "additional work he apparently had done on the PET scanner application" in return for his agreement to attend the CON Board meeting at which HealthSouth's application for a rehabilitation hospital in Phenix City was considered. At the meeting, Carman recused himself from voting on the application. Adams attended, and although he abstained from voting, under the Board's rules, his abstention did not affect the quorum his presence established, thus permitting a vote to be taken. There was no opposition to the application and the Board unanimously approved the application.

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[22] Scrushy does not make this argument.

[23] There was testimony that Adams had never written a CON Board application, and that his work was substandard.

Six months later, the PET scanner application was also approved. At this meeting, Adams' presence was not necessary to the quorum. Carman recused himself, and Adams abstained from voting. The application was unopposed and passed unanimously.

Alva Lambert, the Executive Director of the Board, testified that unopposed applications were routinely approved, and that both these applications were consistent with prior Board actions. There was no evidence that Siegelman knew of Carman's actions in hiring Adams to prepare the application. There was no evidence that he knew of any of these Board actions.

Siegelman challenges the sufficiency of this evidence to establish that he caused the Board letters to be mailed to HealthSouth, informing it of the award of Certificates of Need in connection with the PET scanner or the rehabilitation hospital. Since there was no evidence that Siegelman participated in the events forming the basis for the charges in Counts 8 and 9, nor even that he had any knowledge of these events, Siegelman argues he cannot be held liable for this conduct on a theory of *respondeat superior* or vicarious liability. In view of our holding that the jury's finding of an explicit agreement between Siegelman and Scrushy to exchange money for a seat on the CON Board is supported by the evidence, we shall address whether the law permits Siegelman to be held liable for Scrushy's subsequent conduct on the Board.

It is the law of this circuit, as well as others, that all who with criminal intent join themselves to the principal scheme may be guilty of a violation of the mail fraud statute. *United States v. Toney*, 598 F.2d 1349, 1355 (5h Cir. 1979). *See also United States v.*

Stapleton, 293 F.3d 1111, 1117 (9th Cir. 2002) ("Like co-conspirators, 'knowing participants in the scheme are legally liable' for their co-schemers use of the mails or wires"); *United States v. Leahy*, 445 F.3d 634, 656 (3d Cir. 2006); *United States v. Stull*, 743 F.2d 439 (6th Cir. 1984); *United States v. Sedovic*, 679 F.2d 1233 (8th Cir. 1982); *United States v. Read*, 658 F.2d 1225 (7th Cir. 1981). Each person who is knowingly a party to the principal scheme is liable for the acts of other schemers in pursuance of that scheme. *Toney*, 598 F.2d at 1355.

Recently, in *United States v. Ward*, 486 F.3d 1212 (11th Cir. 2007), we reiterated this long-standing principle that, if one participant in a fraudulent scheme causes a use of the mails in execution of the fraud, all other knowing participants in the scheme are legally liable for that use of the mails:

> For nearly as long as mail fraud has been a federal crime, it has been the law in this Circuit, and in the former Fifth Circuit, that a defendant may be convicted of mail fraud without personally committing each and every element of mail fraud, so long as the defendant knowingly and willfully joined the criminal scheme, and a co-schemer used the mails for the purpose of executing the scheme.

Id. at 1222.

It may be assumed, then, that Siegelman did not sign or cause to be mailed either of the letters set out in Counts 8 and 9, or even that he participated in the events generating those letters. He may, nevertheless, be held criminally liable for Scrushy's conduct on the Board if he was a knowing party to a scheme that included that conduct.

The question regarding these counts is whether the criminal scheme charged in the indictment was broader than the initial pay-to-play agreement between Siegelman and Scrushy, but also included agreement on the broader objective of permitting or promoting Scrushy's self-dealing while on the Board. If so, it is immaterial that Siegelman may not have known about each particular success in that scheme or caused to be mailed the CON Board letters that furthered that scheme. "A partnership in crime being established against both appellants, the acts of [Scrushy] in furtherance of the common criminal enterprise were in law the acts of [Siegelman] also." *See Belt v. United States*, 73 F.2d 888, 889 (5th Cir. 1934).

Just as in *Ward*, where the defendant denied knowledge of both the mailing and the circumstances prompting it, Siegelman's lack of involvement in causing a specific mailing and the circumstances prompting it are immaterial so long as there is sufficient evidence to show that he was a knowing participant in the broader fraudulent scheme, which involved the use of the mails. *See Ward*, 486 F.3d at 1223 (citing *United State v. Bright*, 588 F.2d 504 (5th Cir. 1979)).

Counts 8 and 9 charge a scheme broader than the initial pay-for-play agreement. These counts alleged that Siegelman and Scrushy agreed not only to exchange money for a seat on the Board, but also that Scrushy "would and did use his seat on the CON Board to attempt to affect the interests of HealthSouth and its competitors," and that Scrushy "would and did offer things of value to another Board member to attempt to affect the interests of HealthSouth and its competitors." The government

argues in its brief that not only did Siegelman know that Scrushy wanted the seat in order to self-deal on the CON Board, but that "it was certainly foreseeable to Siegelman that Scrushy would bribe another Board member to further HealthSouth's interests" since " [a]fter all, Scrushy paid Siegelman $500,000 to get HealthSouth a seat on the Board in the first place." Thus, the indictment charges a broader scheme that would subject Siegelman to criminal liability for Scrushy's actions on the Board so long as Siegelman was a knowing participant in that broader scheme.

The final question, then, is whether the government proved that scheme. In order to uphold Siegelman's convictions on Counts 8 and 9, the evidence must have been sufficient for the jury to conclude both that Siegelman knew that Scrushy intended to defraud Alabama of his honest services while on the Board and that Siegelman personally intended to participate in this fraud. We hold that it was not.

The testimony in support of the government's allegation of a pay-to-play scheme whereby Scrushy paid Siegelman for a seat on the CON Board came principally from Bailey, Martin, Young, McGahan, and Skelton. Of these witnesses, only Skeleton, HealthSouth's lawyer in charge of certificates of need, had any knowledge about Scrushy's subsequent alleged self-dealing while on the CON Board. Her testimony, however, did not mention Siegelman. Alva Lambert, the Executive Director of the CON Board during the relevant time and the other primary government witness in support of the allegations of Scrushy self-dealing, testified that the Siegelman CON Board was an "extremely well-balanced" Board, that CON Boards had never to his knowledge turned

down an application for a PET scanner, and that he never saw Siegelman exert any influence or try to exert any influence whatsoever over a Board decision.

Neither in its brief nor at oral argument did the government point to *any* testimony in support of its allegation that Siegelman and Scrushy agreed to a broader scheme in which Scrushy would self-deal on the Board. Nor has our independent and careful review of record revealed any.

Rather, the government's brief argues that Siegelman's knowing participation in the broader self-dealing scheme may be inferred from three facts proven at trial: first, that Siegelman and Scrushy agreed to exchange the CON Board seat for money; second, that the amended Foundation financial statements that disclosed the Scrushy donations, which were filed around the time of the mailings, did not list Scrushy as the ultimate source of the IHS check; and third, that Siegelman was still governor when the Pet scanner and Phenix City projects were approved and could have removed Scrushy or Carman from the Board at any time. The first two of these facts relate primarily to the initial pay-to-play scheme, and the final fact is not sufficient to show participation in a broader scheme, much less knowing participation. None is remotely sufficient to permit a jury to infer that Siegelman agreed to a broader self-dealing scheme.

In view of this absolute lack of any evidence whatsoever from which the jury could infer that Siegelman knowingly agreed to or participated in a broader scheme that included Scrushy's alleged subsequent self-dealing while on the Board, we shall reverse Siegelman's convictions on these counts.

2. Bribery Counts and the Statute of Limitations

Defendants claim that their bribery convictions are time-barred because the statute of limitations began to run no later than the date of Siegelman's receipt of the IHS check or Scrushy's appointment and the indictment was returned more than five years after that. They did not, however, raise this argument before the district court, either in a pretrial motion or at trial. It is, therefore, waived.

Defendants do not dispute that they first raised this limitations claim in motions for judgment of acquittal under Fed. R. Crim. P. 29(c), over one month after the jury rendered its verdict. We have previously rejected such attempts to challenge the sufficiency of the indictment after the trial. *United States v. Ramirez*, 324 F.3d 1225 (11th Cir. 2003). In *Ramirez*, we rejected a limitations defense raised by way of a post-trial Rule 29 motion. *Id.* We held that "when a statute of limitations defense is clear on the face of the indictment and requires no further development of facts at trial, a defendant waives his right to raise that defense by failing to raise it in a pretrial motion." *Id.* at 1228-29.

Even where the facts are at issue regarding the limitations period, this court and its predecessor have long held that "the statute of limitations is a matter of defense that must be asserted at trial by the defendant" and that failure to do so results in a waiver. *United States v. Najjar*, 283 F.3d 1306, 1308 (11th Cir. 2002); *accord Capone v. Aderhold*, 65 F.2d 130, 131 (5th Cir. 1933). Other circuits agree. *See, e.g., United States v. Gallup*, 812 F.2d 1271 (10th Cir. 1987); *United States v. Karlin*, 785 F.2d 90, 92-93 (3d Cir. 1986).

Requiring the defendant to assert a limitations defense at trial gives the prosecution a fair opportunity to rebut the defense through additional evidence or during summation. *See United States v. Arky*, 938 F.2d 579, 582 (5th Cir. 1991); *United States v. Oliva*, 46 F.3d 320, 324-25 (3d Cir. 1995). Furthermore, the "determination of when the crime has been committed for statute of limitations purposes . . . is ordinarily a question of fact for the jury." *Oliva*, 46 F.3d at 324-35.

Allowing a defendant to raise a limitations defense for the first time in a post-verdict Rule 29 motion "is inconsistent with the characterization of the statute of limitations as an affirmative defense and would unfairly sandbag the government." *United States v. Thurston*, 358 F.3d 51, 63 (1st Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005).

The defendants apparently made a strategic decision not to present a statute of limitations defense at trial. Such a defense would have required them to make an argument to the jury that assumed their guilt on the bribery charges. While defendants are free to make the strategic decision not to do so, they may not later be heard to complain when the claim is held to have been waived.

3. Sufficiency of the Evidence of Obstruction of Justice

Siegelman was charged with two counts of obstruction of justice.[24] The indictment alleged and the

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[24] Section 1512(b)(3) provides in pertinent part:

> Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to–

government undertook to prove that eighteen months after the $9200 pay-to-play payment to Siegelman from Lanny Young, Siegelman and Bailey became aware of the federal-state corruption investigation and instigated a series of sham check transactions in an effort to coverup the payment. The coverup was designed to make it appear that Bailey had borrowed the $9200 from Young so that he could buy a motorcycle from Siegelman.

Count 16 alleged that Siegelman corruptly persuaded Bailey to write a check for $10,503 to Young with the notation "repayment of loan plus interest." Count 17 alleged that Siegelman corruptly persuaded Bailey to write and give him a check for $2973.35 with the notation on it that it was the "balance due on m/c." Count 17 also alleged that Siegelman engaged in misleading Bailey's attorney with the intent to hinder or prevent the attorney's communication of information regarding these transactions to the FBI.

The jury acquitted Siegelman of Count 16, but convicted him on Count 17. Siegelman contends that the evidence was insufficient to show that he persuaded Bailey to write the check charged in Count 17 or that he misled Bailey's attorney. We turn now to the evidence.

At trial, Young testified that in January of 2000, Siegelman asked him for $9200 to buy a motorcycle and that he gave it to Siegelman as part of the pay-

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. . .

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . .

to-play, on-going agreement he had with Siegelman. He also testified that, eighteen months later, after the federal-state corruption investigation began, he and Bailey had the following conversation:

> Young: Right after the investigation started, Nick [Bailey] called me and asked me if I could recall how I made out the check for the motorcycle. And I said—on what account I had written the check for the motorcycle. And I said no, why? He said because if it's on one of your personal accounts, you are going to have a motorcycle in your driveway tonight.

Bailey testified that the coverup began when:

> Bailey: I found out about the investigation that was going on with Lanny—could have involved others; we weren't sure at the time. I wanted to repay Lanny's $9200. I did it in the form of a check. Did a promissory note with Lanny to repay this $9200 plus interest, $10,503.

Bailey gave the following testimony regarding Siegelman's involvement in this first step in the coverup:

> Government: When you went to write this check to Lanny [Young] to disguise this earlier transaction, did you do that with the knowledge of the Governor?
>
> Bailey: Yes.
>
> Government: Did you talk to him about it before you did it?
>
> Bailey: Yes.
>
> Government: Was he in agreement with you doing that?

Bailey: Yes.

Government: When you talked to him about why you were going to do that, did you guys talk about the fact that this criminal investigation was going on?

Bailey: Yes.

Government: What were you and the Governor trying to accomplish when you wrote that check back to Lanny Young 17 months after that check had been written for $9200 to the Governor?

Bailey: To disguise the $9200 that went from Lanny to me to the Governor.

Young's testimony regarding the purported repayment was:

Government: Had you loaned Nick Bailey any money that would cause him to give you that $10,503 check?

Young: No.

Government: Well, what was going on when he wrote you that check, if you know?

Young: He was trying to make the $9200 look like a loan.

Bailey testified that the final step in the coverup was to give Siegelman a $2,793.35 check with the notation on it that it was "balance due on m/c" to make it appear that the check was Bailey's final payment for the motorcycle. His testimony about Siegelman's involvement in this step of the coverup was:

Government: What was going on here?

Bailey: We made a decision to finalize the agreement we made regarding the motorcycle early on, and this was to finish that.

We met at the Governor's attorney's office and with my attorney, and that's when I finished paying the Governor in full for the motorcycle to carry out the plan that we had entered into probably 12 to 18 months earlier.

Government: And what was that plan?

Bailey: To disguise the $9200 from Lanny to the Governor.

Finally, Bailey testified regarding his interview with the FBI regarding this meeting:

Government: Now, not long after [he gave the check to Siegelman] you had an occasion to be interviewed by federal and state criminal investigators, didn't you.

Bailey: Yes, sir.

Government: When they questioned you about this transaction on that occasion, did you tell them the truth about what had happened?

Bailey: No.

Government: Why not?

Bailey: There were a number of reasons; but primarily, I was still trying to protect myself and my boss.

The jury considered all of this testimony and found Siegelman guilty of the obstruction of justice charged in Count 17, but not in Count 16. This means that the jury decided, as a matter of fact, that Siegelman persuaded Bailey to write the check for $2973.35, but not the initial check for $10,500.

In evaluating the sufficiency of the evidence to support the jury's verdict, we are required to "view the evidence in the light most favorable to the

government and resolve all reasonable inferences and credibility evaluations in favor of the jury's verdict." *United States v. Robertson*, 493 F.3d 1322, 1329 (11th Cir. 2007). The evidence needs not "be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *Id.* (internal quotation marks omitted).

A reasonable juror could have concluded that Siegelman persuaded Bailey (he asked and Bailey agreed) to take the final step in the cover up by giving him a $2793.35 check with the notation that it was final payment for the motorcycle. *See United States v. Tocco*, 135 F.3d 116, 126-27 (2d Cir. 1998) (affirming jury inference of persuasion from defendant's strong influence over witness who was employee); *United States v. Morrison*, 98 F.3d 619, 629-30 (D.C. Cir. 1996) (making a request sufficient persuasion). The testimony was that Siegelman knew and agreed that Bailey would disguise Young's payment to Siegelman as a loan to Bailey to buy the motorcycle by "paying back" Young with his own check. The evidence further showed that Siegelman accepted and cashed the $2973.35 check from Bailey with the notation that it was final payment for the motorcycle. Finally, the jury had heard testimony that Bailey always did what Siegelman asked him to do.

The jury's acquittal on Count 16 shows that it was not convinced beyond a reasonable doubt that Siegelman instigated the coverup by directing Bailey to "pay back" Young with the initial $10,500 check. But by the time Bailey wrote the check to Siegelman for $2793.35, just over four months later, as a final step in the coverup, the jury's conviction on Count 17

indicates that it concluded Siegelman not only knew what Bailey was doing to coverup Young's corrupt payment, but that he was directing the coverup by persuading Bailey to write the check to him.

This sort of split verdict is itself evidence that the jury considered the charges carefully and individually, addressed the strength of the evidence on each charge, and reached a reasoned conclusion. *See United States v. Dominguez*, 226 F.3d 1235, 1248 (11th Cir. 2000) (making these comments in the context of allegations of premature jury deliberations).

Siegelman's argument against the sufficiency of this evidence mirrors that he made against his convictions on virtually all the other counts—that the evidence in this case was not perfect, that it relied too heavily on circumstances and required the jury to draw inferences from those circumstances that might have been drawn differently by different jurors.

But this is far too academic a view of trial by jury. In the absence of a defendant's confession or observation of his wrongdoing by a third person, proof by circumstantial evidence and the fair inferences to be drawn therefrom is both necessary and permissible. Siegelman's contention throughout his brief that "there was no evidence" to support a particular inference too often meant merely that there was no evidence other than Bailey or Young's testimony. While Siegelman may not approve that the testimony of coconspirators was sufficient to support the jury's findings of fact, the jury was free to disregard or disbelieve it. They believed it.

With respect to the "misleading" prong of the statute, the evidence was more than sufficient to support the jury's finding that the delivery of the final

check in the presence of the two lawyers and the use of the lawyers to "finalize" the sale of the motorcycle to Bailey was an attempt to "create witnesses as part of a cover-up and to use unwitting third parties or entities to deflect the efforts of law enforcement agents in discovering the truth," *United States v. Veal*, 153 F.3d 1233, 1247 (11th Cir. 1998) (statute satisfied by "the *possibility* or *likelihood* that [the defendants'] false and misleading information would be transferred to federal authorities. . ."). The jury was entitled to infer from the sham check transaction in Bailey's lawyer's presence that Siegelman intended to mislead the lawyer into believing that the transaction was legitimate, that Bailey had, indeed, purchased the motorcycle from him, and that the check was final payment. As the "unwitting third party," the lawyer would be in a position factually to support the cover up since Siegelman clearly knew that there was a "possibility" that the federal investigators would come asking.[25]

4. Admission of a Co-conspirator's Statement

Defendants challenge the admission of Hanson's out-of-court statement to Martin at a HealthSouth retreat in the fall of 1999. Martin testified that Hanson "was bragging about the fact that he was able to get [HealthSouth] a spot on the CON Board with the help of the [IHS] check."

Under Fed. R. Evid. 801(d)(2)(E), a court has the discretion to admit coconspirator statements made during and in furtherance of the conspiracy. The

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[25] Indeed, the "bill of sale" for the motorcycle, prepared by the attorneys, was introduced at this trial. Similarly, Bailey had also delivered the "loan re-payment" check for $10,503.39 to Young in the office of Young's lawyer.

court's admission of such statements is an abuse of its discretion to do so if the statements do not meet this legal standard. *United States v. Magluta*, 418 F.3d 1166 (11th Cir. 2005).

This court applies a liberal standard in determining whether a statement was in furtherance of a conspiracy. *United States v. Santiago*, 837 F.2d 1545, 1549 (11th Cir. 1988). "The statement need not be necessary to the conspiracy, but must only further the interests of the conspiracy in some way." *United States v. Miles*, 290 F.3d 1341, 1351 (11th Cir. 2002). "[I]f the statement 'could have been intended to affect future dealings between the parties,' then the statement is in furtherance of a conspiracy." *United States v. Caraza*, 843 F.2d 432, 436 (11th Cir. 1988) (quoting *United States v. Patton*, 594 F.2d 444, 447 (5th Cir. 1979)). Finally, "[s]tatements between conspirators which provide reassurance, serve to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy further the ends of the conspiracy . . . ." *United States v. Ammar*, 714 F.2d 238, 252 (3d Cir. 1983). Even defendants concede that boasting or bragging is in furtherance of a conspiracy if the statements are directed at obtaining the confidence or allaying the suspicions of coconspirators. *Santiago*, 837 F.2d at 1549.

Hanson's statement at the HealthSouth retreat furthered the conspiracy. We agree with the government that, given Martin's own involvement in the conspiracy (obtaining the IHS check), Hanson's bragging to him about purchasing the CON Board seat "with the help of" the IHS check informed Martin that their plan had worked and that Martin's involvement had helped. This alone is sufficient to permit its introduction under *Ammar*, 714 F.2d at

252. Additionally, however, the statement is easily seen to affect the coconspirators future dealings because Martin's assistance might be needed in connection with the second $250,000 donation and Hanson knew this. Thus, Hanson's statement easily meets the Caraza standard. 843 F.2d at 436 (approving statement admitted after several acts of conspiracy helping to ensure final acts). The district court did not abuse its discretion in admitting this evidence.

5. Juror Misconduct

Defendants filed a joint motion for a new trial under Fed. R. Crim. P. 33(a), alleging juror misconduct by way of both juror exposure to extraneous information as well as by improper juror deliberation and that each impropriety violated the Sixth Amendment and requires a new trial.[26] After conducting two evidentiary hearings on this issue,[27] the district court held that no substantial violation of the Sixth Amendment occurred that required a new trial. We review the denial of a motion for new trial based on alleged juror misconduct for an abuse of discretion. *United States v. Venske*, 296 F.3d 1284, 1290 (11th Cir. 2002).[28] We will consider each of the claims of misconduct in turn.

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[26] Scrushy has moved this court to appoint a special master under Fed. R. App. R. 48 to investigate the matter. The request is denied.

[27] In the first of these hearing, the court considered the affidavit of Juror 5 to determine whether it established sufficient reason to conduct further inquiry, concluding that it did.

[28] Of course, the district court's findings of facts supporting its legal conclusion are reviewed only for clear error. *United States v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990).

A. Juror Exposure to Extraneous Information

The Sixth Amendment to the United States Constitution guarantees the right to trial by an impartial jury. U.S. Const. amend. VI. To protect the right to an impartial jury, the Supreme Court has recognized that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). The jury must determine guilt solely on the basis of the evidence presented at trial and the court's instructions as to the applicable law. *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965).

We presume, however, that the jury has been impartial. *United States v. Winkle*, 587 F.2d 705, 714 (5th Cir. 1979).[29] A defendant who alleges denial of this right resulting from juror exposure to extraneous information has the burden of making a colorable showing that the exposure has, in fact, occurred. *Id.* *See also United States v. Ayarza-Garcia*, 819 F.2d 1043, 1051 (11th Cir. 1987). If the defendant does so, prejudice to the defendant is presumed and the burden shifts to the government to show "that the jurors' consideration of extrinsic evidence was harmless to the defendant." *Remmer v. United States*, 347 U.S. 227 (1954); *United States v. Ronda*, 455 F.3d 1273, 1299 (11th Cir. 2006).[30]

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[29] All decisions of the Fifth Circuit prior to October 1, 1981, when this court was established, have been adopted as decisions of this court. *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

[30] *Ronda* recognized that there has been some inconsistency in our application of *Remmer*, but, as in *Ronda*, we decline to

If the district court concludes the exposure to the extrinsic evidence was harmless to the defendant, on appeal, we review this conclusion for an abuse of discretion. *Id.* at 1296 n.33. In doing so, we look at all the circumstances and we consider: (1) the nature of the extrinsic evidence; (2) the manner in which it reached the jury; (3) the factual findings in the district court and the manner of the court's inquiry into the juror issues; and, (4) the strength of the government's case. *Id.* at 1299-1300.

Defendants attached several exhibits to their motion regarding juror misconduct, including news articles after the trial and copies of affidavits by Juror 5 and his wife and his wife's pastor. This material, especially the affidavits of Juror 5, suggested that, during the trial, some of the jurors may have seen information about the trial on the internet.

Finding that the defendants had made a colorable showing of extrinsic influence on the jury, the district court held a hearing to which all twelve jurors were summoned and told to bring with them any material related to outside information that they or any other juror considered during trial or deliberations. At the hearing, the court asked each juror a series of twelve questions designed to reveal the nature and extent of any extrinsic evidence to which the jurors were exposed.[31] Each juror testified under oath in response to the twelve questions and follow-up questions.

Based upon this testimony, the district court found that there was credible evidence establishing that during deliberations some of the jurors were exposed

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consider this issue because it has no bearing on the outcome. 455 F.3d at 1299 n.36.

[31] These questions are attached as Exhibit "A" to this opinion.

to the following extrinsic evidence: (1) a copy of the Second Superseding Indictment obtained from the district court's own website; and (2) juror information from the website concerning the foreperson's obligation to preside over the jury's deliberations and to give every juror a fair opportunity to express his views.

1. Exposure to a Book About the Role of the Foreperson

As a matter of fact, and based upon the testimony given by the jurors in the hearing, the district court found that the extrinsic evidence accessed from the district court's own website by Juror 7 and mentioned by him in jury deliberations did not pertain to any substantive issue in defendants' trial. It concerned only the process of deliberation. Furthermore, it did not contradict any instruction given by the court, was consulted and discussed for only a few moments of a more than five-day deliberation. It was discussed to encourage full participation by all the jurors. The district court concluded that the exposure of the jury to this extrinsic information was harmless to the defendants.

We agree. In substantially similar circumstances, we affirmed a district court's decision that a new trial was not required in a case where the jury foreman went to the library and checked out a book entitled *What You Need to Know for Jury Duty*, and then exposed the jury to it. *United States v. De La Vega*, 913 F.2d 861, 869 (11th Cir. 1990). In that case, the foreperson read the book, implemented suggestions for jury procedures outlined in the book, brought the book to the jury room, and showed some other jurors a page in the book that outlined organizational steps for deliberation. *Id.* at 869-70. We held that the dis-

trict court did not abuse its discretion in concluding that there was no reasonable possibility that the introduction of this extrinsic information prejudiced the defendants such that a new trial was required. *Id.* at 870-71.

The district court did not abuse its discretion in concluding that the introduction of similar information in this case was harmless beyond a reasonable doubt. The district court carefully investigated this matter. Its factual findings that this information was unrelated to the charges or any evidentiary matter in the case, and that it was introduced by a juror, not an outside influence, are not clearly erroneous. Furthermore, the district court held, and we agree, that the government's case was strong on the counts of conviction. In view of these findings, we conclude that the district court did not abuse its discretion in holding that there was no reasonable possibility of prejudice to the defendants arising out of the exposure of the jury to this extrinsic evidence and denying the motion for a new trial.

2. Exposure to the Unredacted Second Superseding Indictment

During trial, the district court granted the government's motion to cure what the court had determined was mutiplicitous charging of the federal funds bribery counts by removing reference to Siegelman in Count 4 and to Scrushy in Count 3 of the Second Superseding Indictment.[32] The district court provided the jury with a copy of the resulting redacted Second Superseding Indictment for its deliberations.

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[32] The government had charged both in each count, thereby permitting each to be convicted twice for the same offense.

Based upon its questioning of the jurors, the district court found that Juror 7 and Juror 40 accessed a copy of the unredacted Second Superseding Indictment early during the jury's deliberations. They each obtained the indictment from the court's website in order to be able to review the allegations outside of the jury deliberation room. Additionally, some other members of the jury became aware that Jurors 7 and 40 had spent time outside of the jury room reviewing the content of this document. While the jury did not discuss this fact at length, it did discuss it. There was no evidence, however, that any members of the jury other than Jurors 7 and 40 actually read the unredacted Second Superseding Indictment, or that either Juror 7 or Juror 40 ever realized that there was any difference between the two indictments.

The district court found that the two jurors had been exposed to the unredacted indictment, which was extrinsic information, and that other jurors had been exposed to the fact that those jurors had obtained a copy of the document from the internet. Considering the totality of the circumstances, including the substantial evidence of defendants' guilt on the counts of conviction, the district court concluded that the jury's exposure to this extrinsic information was harmless beyond a reasonable doubt and it denied them a new trial.

We agree. This extrinsic evidence was the charging document itself. The district court specifically found that, prior to the redaction, the jurors had been repeatedly exposed to comment by the court and all the parties on the contents of the Second Superseding Indictment. Exposure to the original indictment, including the duplicitous charging, was, therefore, innocuous and cumulative of information properly be-

fore the jury. The district court specifically found that the exposure of any juror to the unredacted indictment would not have provided that juror with factual information to which the juror did not already properly have access, nor would it have provided that juror with any legal knowledge different from that provided to the jury as a whole.

Furthermore, the jury was repeatedly instructed that the indictment was not evidence of guilt, and that it must decide the case solely on the evidence properly admitted during the trial. The jury is presumed to follow the district court's instructions. *See United States v. Shenberg*, 89 F.3d 1461, 1472 (11th Cir. 1996).

Based upon the district court's investigation of this claim, its careful review of the nature, source and use of the extrinsic information in the context of the substantial evidence of defendants' guilt, we hold that the district court did not abuse its discretion in denying defendants a new trial for this reason.

3. Exposure to Limited Portions of Media Coverage

During the hearing, Jurors 7, 22, and 40 revealed that they had inadvertently experienced limited exposure to some media coverage during the trial. These jurors testified that, despite their best efforts, they had overheard snippets of television coverage or seen headlines regarding the case in newspapers or online. The court found that such limited, inadvertent exposure was not surprising given the intense media scrutiny of the trial. The court further found that the jurors' testimony was especially credible since it was clear to it that the jurors felt compelled to disclose even the most incidental and inadvertent

exposure to extrinsic information. Juror 22 testified that she would leave the room or mute the television when the news came on, and Jurors 7 and 40, who saw headlines, testified that they did not read the accompanying stories prior to the verdict. The court also found that there was no evidence that the jury discussed any media reports prior to the verdict.

Our review of the record supports these findings and the district court's conclusion that the exposure of these jurors to media reports about the trial was harmless. In view of the limited and incidental nature of this exposure and the substantial evidence of defendants' guilt on the counts of conviction, we hold that the district court did not abuse its discretion in denying the defendants a new trial for this reason.

B. Juror Deliberations

Defendants rely upon purported emails allegedly exchanged between jurors during trial and deliberations. Documents said to be copies of such exchanges were mailed anonymously to the defense, to argue that there was both premature jury deliberation and deliberation by fewer than all the jurors in this case, and that this improper deliberation denied the defendants of their Sixth Amendment right to an impartial jury.

These allegations posed a very different problem for the district court from those suggesting that the jury had been subject to external influences. District courts are subject to very stringent limitations on their authority to question jurors about their deliberations, and to use one or more juror's testimony to impeach the verdict of all. In fact, for nearly a century, the Supreme Court has recognized a near-universal and firmly established common-law rule

flatly prohibiting the use of juror testimony to impeach a verdict. *Tanner v. United States*, 483 U.S. 107, 117 (1987); *McDonald v.* Pless, 238 U.S. 264 (1915).

The Court has repeatedly emphasized the important policy considerations that require the shielding of juries from public scrutiny of their deliberations. *Williams v. Florida*, 399 U.S. 78, 100 (1970). "The essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Id.* Because our system of justice so prizes this unique and essential feature of our criminal justice system, it both anticipates and tolerates some level of imperfection in the system. *United States v. D'Angelo*, 598 F.2d 1002, 1004-05 & n.4 (5th Cir. 1979).[33] As the Supreme Court has explained:

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussions in the jury room, jurors'

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[33] For example, we permit logically inconsistent jury verdicts as to different counts, and even as to different co-defendants. We permit jury nullification. We do not inquire whether a verdict is the result of compromise, mistake or even carelessness.

> willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Tanner, 483 U.S. at 120-21 (internal citations omitted).

Permission to attack jury verdicts by postverdict interrogations of jurors would allow defendants to launch inquiries into jury conduct in the hope of discovering something that might invalidate the verdicts against them. "Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *Id.* at 119-20 (quoting *McDonald*, 238 U.S. at 267-68)). Such events would result in "the destruction of all frankness and freedom of discussion" in the jury room. *Id.* And, as early as 1892, the Supreme Court expressed concern that such postverdict investigation would "induce tampering with individual jurors subsequent to the verdict." *Mattox v. United States*, 146 U.S. 140, 149 (1892). In a justice system that depends upon public confidence in the jury's verdict, such events are unacceptable.

In an effort to protect the jury system, the Federal Rules of Evidence enshrine the common law rule against the admission of a juror's testimony to impeach the jury's verdict. Rule 606(b) provides:

> (b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of any-

> thing upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b).

By disallowing a juror to impeach the jury's verdict by testimony about their deliberations, the rule operates to protect jurors from postverdict investigation and to protect the verdict from endless attack.[34]

We have previously affirmed district courts that have denied motions for a new trial while declining to conduct investigations into jury deliberations. *Cuthel*, 903 F.2d at 1381. In *Cuthel*, we held that the district

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[34] The only exception to the rule is to permit the sort of examination of jurors conducted by the district court in this case to determine whether the jury considered extrinsic information to the defendant's prejudice, as discussed in the immediately preceding portion of this opinion. The district court found as a matter of fact that it had "no doubt whatsoever that the documents purporting to be juror emails on which the Defendants rely are wholly unrelated to any evidence of jury exposure to extraneous information or outside influence." We conclude that this finding of fact is not clearly erroneous. In addition, we see no abuse of discretion in the way the district court dealt with the three other emails called to its attention after the evidentiary hearings.

court did not abuse its discretion in failing to conduct an evidentiary hearing despite evidence of premature deliberations by the jury and evidence of intrajury pressure to reach a verdict. *Id.* at 1383; *see also United States v. Barshov*, 733 F.2d 842, 852 (11th Cir. 1984) (duty to investigate arises only in the context of extrinsic influence); United McElroy by *McElroy v. Firestone Tire & Rubber Co.*, 894 F.2d 1504, 1511 (11th Cir. 1990) (denying defendant's requests to interview the jury members based on allegations of improper deliberations).

The district court said that it had serious reservations about the authenticity of these purported emails, but concluded that the law barred it from questioning the jurors about their deliberations, or about the emails purporting to suggest that the jurors deliberated improperly.[35] Instead, it stated that "[e]ven if the Court were to assume *arguendo* the authenticity of these documents," it would not find that the emails established that the jury either deliberated prematurely or without all its members in any significant measure.

The court based this conclusion upon its factual findings that some of the emails might relate to discussion of the case prior to the submission of the case to the jury, that others might indicate limited deliberation by fewer than all the members of the jury, and that some indicate possible consideration of penalties faced by the defendants. According to the district court, this was the most that the emails showed.

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[35] Defendants urged the court to obtain information regarding the emails from the jurors' internet providers but provided the court with no legal authority in support of this "unusual and intrusive investigation of jurors." In view of the law governing postverdict investigation of jurors, the court denied the request.

The court concluded that, while "it is unquestionably clear that such discussions constitute misconduct, it is not the sort of conduct that this Court can or should directly inquire into by interrogating jurors, nor is it in this Court's view grounds for granting a new trial." Considering the totality of the circumstances, the strength of the government's case, the length of jury deliberations, and the court's instructions to the jury, including the instructions not to decide or discuss the case prematurely, the district court held that there was no reasonable possibility that the defendants suffered prejudice from any premature deliberations, discussion of penalty, or deliberation with fewer than all the members of the jury present.

We agree. Additionally, we note that the verdict in this case was split in that Siegelman was acquitted of many of the charges.[36] Such a split verdict lends supports to a conclusion that the jury carefully weighed the evidence and reached a reasoned verdict free of undue influence and did not decide the case prematurely. *United States v. Dominguez*, 226 F.3d 1235, 1248 (11th Cir. 2000); *Cuthel*, 903 F.2d at 1383.

We conclude, therefore, that the district court did not abuse its discretion in deciding that the purported emails, assuming they are authentic, do not entitle defendants to a new trial. The district court applied the relevant factors to the email evidence, and was well within its discretion to conclude that

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[36] Scrushy argues that because he was convicted on all counts against him, that the verdict was not split as to him. The law, however, is to the contrary. *See United States v. Baker*, 432 F.3d 1189, 1237 (11th Cir. 2005) (a split verdict is one in which the jury finds "guilt as to some defendants or charges but not as to others").

they did not demonstrate premature deliberation or deliberation with fewer than all jury members sufficient to arise to a constitutional violation.[37]

6. District Court Failure to Recuse

Scrushy contends that he is entitled to a new trial because Chief Judge Fuller should have disclosed his "extraordinary extrajudicial income from business contracts with the United States Government pursuant to 28 U.S.C. § 455(a)." This claim is predicated upon Chief Judge Fuller's ownership interest in two aviation companies that engage in business with agencies of the United States government. This claim was raised over nine months after trial and incorporated information learned from the internet and from Chief Judge Fuller's Financial Disclosure Reports.

A motion for recusal based upon the appearance of partiality must be timely made when the facts upon which it relies are known. The untimeliness of such a motion is itself a basis upon which to deny it. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986). The rule has been applied when the facts upon which the motion relies are public knowledge, even if the movant does not know them. *See National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 957-59 (2d Cir. 1978). The purpose of the rule is to "conserve judicial resources and prevent a litigant from waiting until an adverse decision has been handed down before moving to disqualify the judge."

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[37]Defendants moved just before oral argument for permission to file supplemental information regarding juror misconduct. At oral argument, the government represented to the court that its investigation into that misconduct did not involve the allegations of juror misconduct at issue in this appeal. For this reason, we shall deny the motion.

Summers v. Singletary, 119 F.3d 917, 921 (11th Cir. 1997).

Scrushy's recusal motion was untimely, based upon information readily available to him prior to trial, and has all the earmarks of an eleventh-hour ploy based upon his dissatisfaction with the jury's verdict and the judge's post-trial rulings. It has no merit.

7. Jury Selection Procedures

Federal criminal defendants have both a statutory and a constitutional right to a grand and a petit jury selected at random from a fair cross-section of their community. Juror Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1869 (the "JSSA"); U.S. Const. amend. VI. By its terms, the JSSA provides remedies for only a "substantial failure to comply" with its requirements for jury selection procedures that are random, objective, and that produce a jury that is a fair-cross section of the community. 28 U.S.C. § 1861 and 1867(d). Mere technical deviations from the JSSA's requirements do not violate the JSSA if they do not result in impermissible discrimination in the jury selection process. *United States v. Gregory*, 730 F.2d 692, 699 (11th Cir. 1984).

Before their trial, both Siegelman and Scrushy filed virtually identical motions, alleging that the Middle District of Alabama committed substantial violations of the JSSA in constructing its Qualified Jury Wheels in 2001 and 2005, and in the selection from those wheels of both their grand and petit juries. Defendants claimed that these violations resulted in their juries being not a fair-cross section of their community. Specifically, Scrushy and Siegelman challenged the Middle District's liberal deferral policy and its procedures for summoning previously

deferred jurors, claiming that they resulted in juries that under-represented African-Americans. The district court denied these challenges. Defendants appeal this denial.

Recently, a panel of this court has upheld the jury selection procedures of the Middle District of Alabama in a case raising virtually the same claims as those asserted here. *United States v. Carmichael*, ___ F.3d ___ (11th Cir. 2009). *Carmichael* held that the Middle District's jury selection procedures—including the liberal deferral policy and the procedures for summoning previously deferred jurors—did not substantially violate the JSSA. Additionally, *Carmichael* held that the Middle District's jury selection procedures did not result in the systematic under-representation of African-American jurors on the 2001 Qualified Jury Wheel or in the jury pools selected from that wheel. ___ F.3d at ___.

In his brief, which Siegelman adopted, Scrushy acknowledges the identity between the claims presented in *Carmichael* and his claims presented here, conceding that "[b]ut for the fact that only the petit jury which was drawn from the 2001 jury wheel was challenged there [the petit jury was drawn from the 2005 wheel here], the issues presented overlap." This is not surprising since the same expert who opined in *Carmichael* about alleged violations of the JSSA and the Constitution is relied upon here, using the same evidence in support of those claims. At the time defendants filed their pre-trial motion, however, *Carmichael* had not yet been decided. Now that it has, it disposes of their claims as to the 2001 jury wheel.

With respect to the 2005 wheel, the district court in this case held that defendants were not entitled to any relief because the challenged objectivity and ran-

domness practices did not apply to that wheel. Additionally, the district court found that defendants had not shown the absolute racial disparity between the composition of his juries and the community at-large of over 10% that is required to establish a statutory or constitutional violation. *See Carmichael*, ___ F.3d at ___; *see also United States v. Gresham*, 63, Fl3d 1074, 1078-79 (11th Cir. 1995). We agree.

Defendants' claims regarding the Middle District of Alabama's jury selection procedures are without merit and do not entitle them to any relief.

8. Siegelman's Sentence

Siegelman contends that the district court's decision to grant an upward departure under U.S.S.G. §§ 2C1.1 cmt.n.5, 5K2.0 (2002) violated the First Amendment and 18 U.S.C. § 3553(a) because it was allegedly based on Siegelman's statements criticizing the prosecutors in and the prosecution of this case. If this were true, we might agree.[38] It does not, however, accurately describe the district court's reasons for the upward departure.

In both its written motion for an upward departure and its arguments at sentencing, the government maintained that Siegelman's criminal conduct reflected such a systematic and pervasive corruption of the office of Governor and Lieutenant Governor, as well as various state agencies, such as the CON Board, as to cause a loss of public confidence in the government of the State of Alabama. The government's motion focused on this allegation of systematic

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[38] The government argues persuasively that, even if there was error here, it was harmless as the departure did not affect Siegelman's ultimate sentence. As we need not, we do not reach this argument.

and pervasive corruption of state government. The government contended that Siegelman "for over six years abused the Executive Branch of the state of Alabama."

The statute permits and the cases relied upon by the government uphold upward departures where the district court finds that there was pervasive corruption of a governmental function resulting in a loss of public confidence in state or local government. *See* U.S.S.G. §§ 2C1.1 cmt.n.5, 5K2.0; *United States v. Shenberg*, 89 F.3d 1461, 1476-77 (11th Cir. 1996); *United States v. Reyes*, 239 F.3d 722, 744-45 (5th Cir. 2001).

Although the government did refer at sentencing to Siegelman's very public criticisms of the federal criminal justice system, including complaints of selective prosecution, there is no indication that the court based its upward departure decision on these attacks. In replying to Siegelman's counsel statement about saving the issue of alleged selective prosecution for another day, the court responded, "Then let's do that."

In considering the request for an upward departure "as set forth in the Government's motion," the district court found that Siegelman's conduct resulted in a loss of public confidence in the executive branch of Alabama government. The district court took judicial notice of the "plethora of media attention" to the case by the local and national media, and relied on this in finding that the case had severely undermined public confidence in Alabama state government.

Siegelman does not contend that an upward departure for his systematic and pervasive corruption of state government was inappropriate, and even his

attorney at sentencing conceded that "certainly the argument could be made, in all candor, that there could be some question as to public confidence in this case."

The district court expressly stated that it was upwardly departing in order to "preserve the integrity of the judiciary and the confidence of the people of the state of Alabama in its elected officials." We find no abuse of discretion in the district court's upward departure in sentencing Siegelman.

IV.

For the foregoing reasons, we conclude that Scrushy's convictions and sentence are due to be AFFIRMED. Siegelman's convictions on Counts 8 and 9 are due to be REVERSED. Siegelman's remaining convictions are due to be AFFIRMED. Siegelman's sentence is due to be VACATED in the light of our reversal of his convictions on Counts 8 and 9 of the indictment, and his case is remanded for resentencing.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. All pending motions in this case are DENIED.

Exhibit A

First question: Did anyone other than another juror try to influence your thinking about this case or your vote on the substantive counts against any Defendant?

Second question: Do you have any reason to believe that any juror was subjected to attempts to influence his or her thinking about the case by anyone other than another juror?

Third question: Did anyone other than another juror attempt to discuss the case with you during the time you were a juror in this case?

Fourth question: During the time that you were serving as a juror did you view any news reports or other information relating to this case or to any Defendant from sources such as newspapers, magazine, radio, or television broadcasts or Internet sites?

Fifth question: During the time that you were serving as a juror did you view any materials from any books, newspapers, Internet sites or any other source relating to any witness, any legal issue, or any factual issue related to this case?

Sixth question: During the time that you were serving as a juror did you in any way attempt to independently in-

vestigate any facts or law relating to this case?

Seventh question: During the time that you were serving as a juror did you overhear any conversations between persons not on the jury or between non jurors as to any member of the jury relating to this case?

Eighth question: During the time that you were serving as a juror did you view or hear any extraneous information about the penalty that might be applicable to any Defendant if he was convicted of the charges in this case?

Ninth question: During the time that you were serving as a juror did you obtain extraneous information from any source about your role as a juror, your jury service generally, or the role of the foreperson?

Tenth question: During the time that you served as a juror did any other juror say or do anything that caused you to believe that he or she may have been exposed to extraneous information as I have defined it about this case from any source?

Eleventh question: During the time that you were serving as a juror did you view or hear any extraneous information about either the law applicable to

this case or any factual material relating to this case?

Twelfth question: Did you bring any documents in response to the subpoena relating to extraneous information?

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed May 14, 2009]

No. 07-13163-BB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DON EUGENE SIEGELMAN, RICHARD SCRUSHY,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Alabama

Before: EDMONDSON, *Chief Judge*, TJOFLAT and HILL, *Circuit Judges*.

PER CURIAM:

The Petitions for Rehearing are DENIED. The Government's letter of March 11, 2009, regarding footnote 37, which the Court construes as a request for clarification, is also DENIED, as the footnote is consistent with the Government's recollection of oral argument. No Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Fed. R. App. Pro.), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
UNITED STATES CIRCUIT JUDGE

APPENDIX C

Excerpts from jury instructions, given June 14, 2006:

...

To "deprive another of the intangible right of honest services" means to violate or to cause a public official or employee to violate the official's or employee's duty to provide honest services to the employer.

Public officials and public employees inherently owe a duty to the public to act in the public's best interest. If, instead, the official or employee acts or makes his decisions based on the official's own personal interests, such as accepting a bribe or receiving personal benefit from the undisclosed conflict of interest, the official has defrauded the public of the official's honest services even though the public agency involved may not suffer any monetary loss in the transaction.

You are further instructed as to the honest services mail and wire fraud counts that you must find not only that the defendants intended to deprive the public of their honest services, but also that they intended to deceive the public and that they intended to alter their official actions as a result of the receipt of campaign contributions or other benefits. Moreover, payments for entertainment, lodging, sports events, and the like would not constitute violations of the honest services mail and wire fraud statutes if the intent of the defendants were simply to cultivate a business or political friendship.

...

Count three charges Governor Siegelman with federal funds bribery in violation of 18, United States Code, Section 666(a)(1)(B). That section makes it a

federal crime or offense for anyone who is an agent of an organization, local government, or local governmental agency receiving significant benefits under a federal assistance program corruptly to accept or agree to accept anything of value from any person intending to be influenced or rewarded in connection with certain transactions of such organization, government, or agency.

Governor Siegelman can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt: first, that Governor Siegelman was an agent of the State of Alabama, as charged; second, that during a one-year period, the State of Alabama received benefits in excess of $10,000 under a federal program involving some form of federal assistance; third, that during such one-year period, Governor Siegelman knowingly accepted or agreed to accept a thing of value – that is, approximately $500,000 – from Mr. Scrushy, as charged; fourth, that by such acceptance or agreement, Governor Siegelman intended to be rewarded in connection with a transaction or series of transactions of the State of Alabama, which transaction or series of transactions involved something of value of $5,000 or more; and that in so doing, Governor Siegelman acted corruptly.

An act is done corruptly if it is performed voluntarily, deliberately, and dishonestly for the purpose of either accomplishing an unlawful end or result or the accomplishing of some otherwise lawful end or result by any unlawful method or means. A defendant does not commit a crime by giving something of value to a governmental official unless the defendant and the official agree that the official will take specific action in exchange for the thing of value.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CASE NO.: 2:05-cr-119-MEF
(WO-Not Intended for Publication)

UNITED STATES OF AMERICA,

v.

DON EUGENE SIEGELMAN and RICHARD M. SCRUSHY,

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the motions for judgments of acquittal made by Defendants Don Eugene Siegelman ("Siegelman") and Richard M. Scrushy ("Scrushy") pursuant to Federal Rule of Criminal Procedure 29.[1] The Court has carefully considered the arguments in support of and in opposition to these motions. For the reasons stated herein,

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[1] Both Siegelman and Scrushy made oral motions for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a) before the case was submitted to the jury. Scrushy also made a written motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a) before the case was submitted to the jury. *See* Doc. # 413. Pursuant to the Federal Rule of Criminal Procedure 29(b), the Court reserved decision on the motions. After the jury's verdict, both Siegelman and Scrushy filed written motions for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c). *See* Doc. # 453, Doc. # 454, & Doc. # 455.

Defendants' motions for judgment of acquittal are due to be DENIED.[2]

BACKGROUND

The indictment[3] in this case named Siegelman as a defendant and alleged that during relevant periods of time, he held various public offices in the executive branch of the government of the State of Alabama.

> [F]rom on or about January 16, 1995, to on or about January 18, 1999, [Siegelman was] the Lieutenant Governor of the State of Alabama, and while Lieutenant Governor was also, from on or about March 31, 1996, to on or about November 3, 1998, a candidate for Governor of the State of Alabama, and was, from on or about January 18, 1999, to on or about January 20, 2003, the Governor of the State of Alabama.

(Second Superseding Indictment at ¶ 1.c).

The indictment also named as defendants Paul Michael Hamrick ("Hamrick"), Gary Mack Roberts ("Roberts"), and Scrushy. During the relevant time periods, Hamrick was employed in the Lieutenant Governor's Office of the State of Alabama and later as Chief of Staff to the Governor. Siegelman appointed Roberts to serve as the Director of the Alabama Department of Transportation.[4] Scrushy was

---

[2] This Memorandum Opinion and Order is not intended to address any pending motions other than the motions seeking judgment of acquittal.

[3] Unless otherwise specifically noted, all references to the indictment are to the second superseding indictment in this case.

[4] Prior to his appointment, Roberts was employed by a business which had substantial dealings with the Alabama Department of Transportation.

the Chairman and Chief Executive Officer of Healthsouth Corporation, an entity which was regulated by the State of Alabama Certificate of Need Review Board ("CON Board").

Count One of the indictment alleged that Siegelman and Hamrick engaged in a RICO conspiracy in violation of 18 U. S.C. § 1962(d).[5] With respect to the "enterprise" requirement of the RICO statutes, the indictment alleged that the "enterprise" is the "Executive Department of the State of Alabama . . . whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise." The alleged broad purpose of the racketeering conspiracy alleged in Count One was "to give or withhold official governmental acts and influence . . . in exchange for money and property to which the participants in the conspiracy were not entitled," and "to deprive the State of Alabama of its right to the honest services of its public officials and employees in exchange for money and property" and "to conceal and otherwise protect the conspiracy and its participants from detection and prosecution." (Second Superseding Indict. at ¶ 5).

Count Two of the indictment alleged a substantive RICO count charging a violation of 18 U.S.C. § 1962(c) which provides as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's

---

[5] This section of the statute provides that it is "unlawful for any person to conspire to violate any of the provisions" of the first three subsections of 18 U.S.C. § 1962.

affairs through a pattern of racketeering activity or collection of unlawful debt.

Count Two of the indictment alleged that Defendants Siegelman and Hamrick "unlawfully and knowingly conducted and participated . . . in the conduct of the affairs of the enterprise through a pattern of racketeering activity" as further set out in the indictment. Count Two set forth a number of separate racketeering acts.

Counts Three and Four of the indictment, in which Siegelman and Scrushy were originally named, charged them with federal funds bribery and aiding and abetting each other "in connection with the appointment of Richard Scrushy to the CON Board," all in violation of 18 U.S.C. §§ 2 & 666(a)(1)(B). (Second Superseding Indict. at ¶¶ 49-51).

Count Five, in which Siegelman and Scrushy were named, charged them with conspiracy to "defraud and deprive the State of Alabama of its right to the honest and faithful services" of Siegelman as Governor and Scrushy as a member of the CON board, in violation of 18 U.S.C. § 371. (Second Superseding Indict. at ¶ 52-66)

Counts Six through Nine, in which Siegelman and Scrushy were named, charged them with aiding and abetting each other to commit honest services mail fraud as part of their scheme to defraud and deprive the State of Alabama of its right to honest services of Siegelman and Scrushy in connection with the CON board, in violation of 18 U.S.C. §§ 2, 1341, & 1346. (Second Superseding Indict. at ¶ 57-60).

Counts Ten through Twelve, in which Siegelman and Hamrick were named, charged them with aiding and abetting each other to commit honest services

mail fraud as part of their scheme to defraud and deprive the State of Alabama of its right to honest services from themselves as public officials in connection with governmental regulation of specified activities, allocation of bond funding and construction contracting, in violation of 18 U.S.C. §§ 2, 1341, & 1346. (Second Superseding Indict. at ¶ 61- 63).

Counts Thirteen and Fourteen, in which Siegelman and Hamrick were named, charged them with aiding and abetting each other to commit honest services mail fraud concerning performance bonds on a construction contract as part of their scheme to defraud and deprive the State of Alabama of its right to honest services from themselves as public officials, in violation of 18 U.S.C. §§ 2, 1343 & 1346. (Second Superseding Indict. at ¶ 64- 65).

Count Fifteen, in which Hamrick was charged, and Counts Sixteen and Seventeen, in which Siegelman was named, charged them with obstruction of justice, in violation of 18 U.S.C. §§ 1512(b)(3) & 2. (Indict. at ¶ 64-68).

Counts Eighteen through Thirty-Three, in which Siegelman and Roberts were named, charged them with aiding and abetting each other to commit honest services mail fraud as part of their scheme to defraud and deprive the State of Alabama of its right to honest and faithful services from themselves as public officials in connection with functions of the Alabama Department of Transportation, in violation of 18 U.S.C. §§ 2, 1341, & 1346. (Second Superseding Indict. at ¶ 69-71).

Finally, Count Thirty-Four, in which Siegelman was named, charged him with extortion under color of official right and by fear of economic harm, in

violation of 18 U. S.C. § 195 1. (Second Superseding Indict. at ¶ 72).

During the trial, the Court threw out Count Three against Scrushy and Count Four against Siegelman because it found that they were multiplicitous. All other counts were submitted to the jury. On June 29, 2006, the jury returned unanimous verdicts. The jury found Defendants Hamrick and Roberts not guilty on all counts. The jury found Scrushy guilty on Counts Four, Five, Six, Seven, Eight, and Nine. The jury found Siegelman guilty on Counts Three, Five, Six, Seven, Eight, Nine, and Seventeen. The jury found Siegelman not guilty on Counts One, Two, Ten, Eleven, Twelve, Thirteen, Fourteen, Sixteen, Eighteen, Nineteen, Twenty, Twenty-One, Twenty-Two, Twenty-Three, Twenty-Four, Twenty-Five, Twenty-Six, Twenty-Seven, Twenty-Eight, Twenty-Nine, Thirty, Thirty-One, Thirty-Two, Thirty-Three, and Thirty-Four.

After receiving the jury's verdicts, the Court set deadlines for the submission of briefs on post-trial motions. Both Scrushy and Siegelman filed written motions for judgment of acquittal which the Government opposed in writing. All pending motions for judgment of acquittal are now fully briefed and ready for determination.

DISCUSSION

The test in considering a motion for judgment of acquittal is whether, viewing all evidence in the light most favorable to the Government and drawing all reasonable inferences from the evidence and credibility choices in favor of the jury's verdict, a reasonable trier of fact could find that evidence established guilt beyond a reasonable doubt. *See United States v.*

O'Keefe, 825 F.2d 314 (11th Cir. 1987). *Accord, United States v. Grigsby*, 111 F.3d 806, 833 (11th Cir. 1997). Put another way, to challenge a jury's guilty verdict on the grounds of insufficiency of the evidence, it must be established that "no reasonable jury could have found Defendant guilty beyond a reasonable doubt on the evidence presented." *United States v. Ruiz*, 253 F.3d 634, 639 (11th Cir. 2001). The evidence may be sufficient even when it does not "exclude every reasonable hypothesis of innocence or [is not] wholly inconsistent with every conclusion except that of guilt," because a "jury is free to choose among reasonable constructions of the evidence." *United States v. Peters*, 403 F.3d 1263, 1268 (11th Cir. 2005).

Siegelman and Scrushy have presented a variety of arguments in their motions for judgment of acquittal. The Court has carefully considered all of them, as well as the responses to those arguments made by the Government. The Court finds that during the course of this very lengthy trial, the Government presented substantial evidence upon which a reasonable trier of fact could conclude that Siegelman and Scrushy engaged in the conduct for which they were convicted. Viewing the evidence presented in a light most favorable to the Government, the Court holds that a reasonable jury could find the evidence established the charged offenses. This is true both when the Court considers the evidence submitted in the Government's case in chief for the purpose of addressing the motions for judgment of acquittal made at the close of the Government's case pursuant to Federal Rule of Criminal Procedure 29(a) and when the Court considers all evidence submitted at trial for the purpose of addressing the motions for judgment of acquittal made after trial pursuant to Federal Rule of Criminal Procedure 29(c). Thus, having applied

that test to the evidence presented in this case, the Court has determined that the evidence was sufficient to sustain each Defendant's conviction on each count in the Second Superceding Indictment. Accordingly, this Court finds that Defendants' arguments are without merit and concludes that Defendants' requests for acquittal are due to be DENIED.

CONCLUSION

For the reasons stated above, the all pending motions for judgment of acquittal filed by either Defendant Don Eugene Siegelman or Richard M. Scrushy are DENIED.

DONE this 2nd day of October, 2006.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX E

18 U.S.C. § 666, "Theft or bribery concerning programs receiving Federal funds"

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $ 5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $ 5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $ 5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. §§ 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1512, "Tampering with a witness, victim, or an informant"

...

(b) Whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a viola-

tion of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.

...

Supreme Court, U.S.
FILED
NOV 13 2009
OFFICE OF THE CLERK

Nos. 09-167 and 09-182

In the Supreme Court of the United States

RICHARD M. SCRUSHY, PETITIONER

v.

UNITED STATES OF AMERICA

DON EUGENE SIEGELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. In *McCormick* v. *United States*, 500 U.S. 257, 273 (1991), the Court held that, to sustain Hobbs Act extortion convictions based on an official's receipt of campaign contributions in exchange for official action, the payments must be "in return for an explicit promise or undertaking by the official to perform or not to perform an official act." The question presented is whether petitioners' convictions for honest-services mail fraud, bribery, and conspiracy are valid absent an instruction requiring the jury to find, and absent direct proof of, an express agreement to exchange campaign contributions for specific official action.

2. Whether the jury could rationally conclude from the evidence that petitioner Siegelman obstructed justice.

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In the Supreme Court of the United States

No. 09-167

RICHARD M. SCRUSHY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 09-182

DON EUGENE SIEGELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-67a) is reported at 561 F.3d 1215.[1]

[1] Citations to "Pet." and "Pet. App." refer to the petition and petition appendix in No. 09-167.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2009. Petitions for rehearing were denied on May 14, 2009 (Pet. App. 70a). The petitions for a writ of certiorari were filed on August 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Alabama, petitioners were convicted of one count of federal-funds bribery, in violation of 18 U.S.C. 666; one count of conspiring to commit honest-services mail fraud, in violation of 18 U.S.C. 371; and four counts of honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346. Petitioner Siegelman was also convicted of one count of obstructing justice, in violation of 18 U.S.C. 1512(b)(3). Pet. App. 2a. The district court sentenced Siegelman to 88 months of imprisonment, to be followed by three years of supervised release, and sentenced petitioner Scrushy to 82 months of imprisonment, to be followed by three years of supervised release. The court also ordered Scrushy to pay a $150,000 fine and $267,000 in restitution. Siegelman Judgment 2-3; Scrushy Judgment 2-5. The court of appeals affirmed Scrushy's convictions, reversed Siegelman's convictions on two mail fraud counts, affirmed his remaining convictions, vacated Siegelman's sentence, and remanded his case for resentencing. Pet. App. 67a.

1. a. In 1998, Siegelman was elected Governor of Alabama. He had campaigned in favor of establishing a state lottery to help fund education. After his election, Siegelman established the Alabama Education Lottery Foundation (AELF) to raise money to campaign for

approval of the lottery by ballot initiative. The initiative appeared on the October 1999 ballot and was defeated. Pet. App. 4a.

Scrushy is the founder and former Chief Executive Officer of HealthSouth Corp., a major hospital corporation with operations throughout Alabama. Under previous governors, Scrushy had served on a state health-care panel—the Certificate of Need Review Board (CON Board)—that determines the number of health-care facilities in the State and therefore was important to Scrushy, HealthSouth, and its competitors. The governor has the sole discretion to appoint and remove members of the CON Board. Pet. App. 2a, 5a; Gov't C.A. Br. 4, 6-7.

Nick Bailey was Siegelman's closest confidential assistant. After the 1998 election, Bailey was present when Siegelman met with Eric Hanson, an outside lobbyist for HealthSouth. Pet. App. 5a-6a. Siegelman told Hanson that because Scrushy had contributed at least $350,000 to Siegelman's opponent in the election, Scrushy needed to "do" at least $500,000 in order to "make it right" with the Siegelman campaign. *Id.* at 6a. Bailey testified that Siegelman was referring to the lottery campaign and that Hanson was to relay this conversation to Scrushy. *Id.* at 5a-6a; Gov't C.A. Br. 8. Bailey also testified that Hanson subsequently told Bailey that Scrushy wanted control of the CON Board and "made it clear to him that if Mr. Scrushy gave the $500,000 to the lottery campaign that [they] could not let him down" with respect to the CON Board seat. Pet. App. 6a. Bailey periodically reminded Siegelman of their conversations "with Eric Hanson about what Mr. Scrushy wanted for his contributions, and that was the CON Board." *Id.* at 7a.

Scrushy told Mike Martin, then Chief Financial Officer of HealthSouth, that to "'have some influence or a spot on the CON Board,'" they would have to help Siegelman raise money for the lottery campaign. Pet. App. 6a. If they did so, Scrushy said, "[they] would be assured a seat on the CON Board." *Ibid.* (brackets in original). Martin testified that "'[they] were making a contribution . . . in exchange for a spot on the CON Board.'" *Ibid.*

Scrushy, however, did not want the contribution to come directly from himself or HealthSouth, so he instructed Martin to ask HealthSouth's investment banker, Bill McGahan of UBS, to make the contribution. Pet. App. 7a. McGahan did not want UBS to make the requested contribution because its size was "out of the norm," but he was pressured into doing so by Martin and Scrushy. *Ibid.* Accordingly, McGahan arranged for one of UBS's clients—Integrated Health Services of Maryland (IHS)—to pay $250,000 to the AELF in exchange for a reduction of $267,000 in the fee that IHS owed UBS. IHS then issued a check payable to the AELF (the IHS check). Scrushy told Martin that it was important that he, Scrushy, hand-deliver the check to Siegelman, so Martin gave the IHS check to Scrushy. *Id.* at 7a-8a.

Siegelman and Scrushy subsequently met in Siegelman's office. Bailey testified that, at some point after the meeting, Siegelman showed Bailey the IHS check and said that Scrushy was "'halfway there.'" Pet. App. 8a. Bailey asked, "'what in the world is he [Scrushy] going to want for that?'" *Ibid.* (brackets in original). Siegelman replied, "'[T]he CON Board.'" *Ibid.* Bailey responded, "'I wouldn't think that would be a problem,

would it?'" *Ibid.* Siegelman replied, "'I wouldn't think so.'" *Ibid.*; see also Gov't C.A. Br. 12-13, 70 n.18.

On July 26, 1999—one week after the date on the IHS check—Siegelman appointed Scrushy to the CON Board. Through Bailey, Siegelman informed the chair-designate of the CON Board that he wanted Scrushy appointed vice-chair, and the CON Board complied. Pet. App. 8a-9a. Bailey testified that Siegelman made Scrushy vice-chair "'[b]ecause [Scrushy] asked for it.'" *Ibid.* (brackets in original).

Siegelman gave the IHS check to Darren Cline, the AELF's fundraising director, and said that it was from Scrushy. Cline expressed concern about the size of the donation (which he saw as "'colossal'" coming from one person); Siegelman, who "called the shots" on the lottery campaign, told Cline to hold the check. Gov't C.A. Br. 15-16; Pet. App. 4a. After the election, however, at Siegelman's direction, Bailey retrieved the check and, without telling Cline, deposited it in a newly opened checking account in the name of the Alabama Education Foundation (AEF), the AELF's successor. *Id.* at 9a; see also Gov't C.A. Br. 16.

On March 9, 2000, the AEF took out a loan, from the same bank that provided the checking account, in order to pay off debt incurred by the Alabama Democratic Party for get-out-the-vote expenses in connection with the lottery referendum; Siegelman and another individual personally and unconditionally guaranteed the loan to the AEF. At that time, the AEF had over $447,000 in its account, $250,000 of which came from the IHS check. On March 13, 2000, the AEF withdrew $440,000 from the account to pay down its loan. Pet. App. 9a; Gov't C.A. Br. 17-18.

In May 2000, Siegelman and Bailey met privately with Scrushy in Scrushy's office. Scrushy gave Siegelman a HealthSouth check for $250,000 payable to the AEF (the HealthSouth check). On May 23, 2000, the HealthSouth check was applied directly against the balance on the AEF's loan. Pet. App. 10a.

In January 2001, Scrushy resigned from the CON Board. Siegelman immediately appointed HealthSouth Vice-President Thom Carman to serve the remainder of Scrushy's term. He subsequently reappointed Carman to a full term. While Carman was serving on the Board, HealthSouth applied for and obtained Certificates of Need for a mobile PET scanner and a rehabilitation hospital. Pet. App. 9a.

The AEF did not timely disclose receipt of either the IHS or the HealthSouth check. Neither the AEF's preelection disclosure statements for the period including July 19, 1999, nor the AEF's annual report for 1999 disclosed the IHS check, and the AEF filed no disclosure statements for 2000 at all. Thereafter, an Alabama newspaper questioned whether the AEF had properly reported its financial dealings with the state Democratic Party, and the Secretary of State's Office contacted the state Attorney General's Office about the AEF's failure to disclose the payoff of the state party's loan. Subsequently, in July 2002, the AEF filed an amended annual report for 1999 and an annual report for 2000, which disclosed the IHS and HealthSouth checks (and other previously undisclosed contributions). Pet. App. 10a; Gov't C.A. Br. 18-20.

b. Lanny Young was a long-time friend of Siegelman's with various business dealings. Young and Bailey testified that, for many years, Young, Bailey, Siegelman, and Paul Hamrick (Siegelman's chief of staff) had a pay-

for-play agreement whereby Young would provide the others with money, campaign contributions, and other benefits in return for official action, as needed, to benefit Young's business interests. Pet. App. 10a-11a; Gov't C.A. Br. 24-25.

In January 2000, Siegelman asked Young to give him $9200 to buy a motorcycle; Siegelman, in fact, had already purchased the motorcycle for $12,173.35. Siegelman told Young to work out the details of the $9200 payment with Bailey. Young then obtained a cashier's check for $9200 made payable to Bailey and gave it to him. Bailey, in turn, gave Siegelman's secretary a $9200 check payable to Siegelman's wife, which was deposited into Siegelman's account that day. But for the deposit, Siegelman's fourth-quarter income-tax payment would not have cleared. Pet. App. 11a; Gov't C.A. Br. 26-27.

In June 2001, Siegelman was aware that federal and state authorities were investigating his dealings with Young. On June 5, 2001, Bailey wrote Young a check for $10,503.39 bearing the notation "repayment of loan plus interest." Gov't C.A. Br. 28; see Pet. App. 11a. Young and Bailey each testified that the purpose of that check was "to cover it [the $9200 payment] up" by making it appear that Bailey earlier had borrowed the $9200 from Young. Gov't C.A. Br. 28. Bailey testified that he had no intention of buying the motorcycle when he wrote the $10,503.39 check to Young, of which Siegelman knew and approved. *Ibid.* Bailey also wrote a check for $2973.35 to Siegelman bearing the notation "balance due on m/c" to provide a reason for Bailey having borrowed money from Young—to purchase a motorcycle from Siegelman. Pet. App. 11a; see Gov't C.A. Br. 28-29.

Bailey gave Siegelman the $2973.35 check in the presence of his own attorney and Siegelman's. Siegel-

man accepted Bailey's check and gave Bailey a bill of sale for the motorcycle, which the attorneys helped finalize. Neither lawyer was told that the purpose of the transaction was to help cover up the $9200 payment from Young to Siegelman. Bailey testified that he lied about the transaction to the attorneys, that he and Siegelman were aware of the investigation at this time, and that he later lied about the transaction to federal investigators to protect himself and Siegelman. Pet. App. 12a.

2. A grand jury sitting in the Middle District of Alabama returned a second superseding indictment against Siegelman, Scrushy, and others. Of the 34 counts alleged, several related to the CON Board scheme: Siegelman and Scrushy were charged with federal-funds bribery, in violation of 18 U.S.C. 666(a)(1)(B) (Siegelman in Count 3, Scrushy in Count 4);[2] conspiracy to commit honest-services mail fraud, in violation of 18 U.S.C. 371 (Count 5); and honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346 (Counts 6-9). Siegelman was also charged with obstructing justice, in violation of 18 U.S.C. 1512(b)(3) (Counts 16-17), for his role in covering up the $9200 payment from Young to Siegelman. Pet. App. 12a-13a; Second Superseding Indictment 29-36, 39-40. The remaining counts against Siegelman charged him and others with RICO offenses and various other offenses arising from conduct unrelated to the CON Board scheme or the cover-up of the payment. *Id.* at 2-29, 36-39, 41-43.

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[2] The Second Superseding Indictment originally charged Siegelman and Scrushy in both bribery counts (Counts 3 and 4), but before verdict, the district court ordered the government to proceed on only one bribery count as to each defendant. Gov't C.A. Br. 3 n.1.

3. At trial, petitioners requested a *quid pro quo* instruction on, *inter alia*, the counts related to the CON Board scheme. They based their request on *McCormick* v. *United States*, 500 U.S. 257 (1991), in which the Court held that a public official's receipt of campaign contributions is subject to prosecution under the Hobbs Act, 18 U.S.C. 1951, as extortion "under color of official right," 18 U.S.C. 1951(b)(2), "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." 500 U.S. at 273. "In such situations," the Court explained, "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Ibid.*

The district court supplemented its instructions on the bribery counts as follows: "A defendant does not commit a crime by giving something of value to a governmental official unless the defendant and the official agree that the official will take specific action in exchange for the thing of value." 09-182 Pet. App. 64a. The district court also supplemented its instructions on the honest-services fraud counts by instructing the jury that to convict "you must find not only that the defendants intended to deprive the public of their honest services, but also that they intended to deceive the public and that they intended to alter their official actions as a result of the receipt of campaign contributions or other benefits." *Id.* at 63a. Petitioners objected that the supplemental instructions were inadequate because they did not require the jury to find an express agreement. Trial Tr. 7320-7324, 7329.

On June 29, 2006, the jury found both petitioners guilty on all of the bribery, fraud, and conspiracy to commit fraud counts related to the CON Board scheme,

and it found Siegelman guilty on the obstruction count relating to the $2973.35 check (Count 17). The jury acquitted Siegelman on the remaining counts and acquitted the other two defendants on all counts. Pet. App. 13a. The district court denied petitioners' post-verdict motions for judgment of acquittal and for a new trial. 09-182 Pet. App. 65a-72a.

4. The court of appeals affirmed Scrushy's convictions, reversed Siegelman's convictions on two fraud counts, affirmed his remaining convictions, vacated Siegelman's sentence, and remanded his case for resentencing. Pet. App. 1a-69a.

a. Petitioners contended that the holding of *McCormick*, interpreting the Hobbs Act to require proof of a *quid pro quo*, was equally applicable to their prosecution for bribery, conspiracy, and honest-services mail fraud. They further contended that the district court failed to give an adequate *quid pro quo* instruction. The court of appeals did not definitively resolve whether *McCormick* applies in this context, because "whether or not a quid pro quo instruction was legally required, such an instruction was given." Pet. App. 18a.

The court of appeals noted that the bribery instructions had required the jury to find that petitioners had "*agree[d]*" to exchange "specific action" (the CON Board appointment) for the "thing of value" ($500,000 to the lottery campaign). Pet. App. 18a. The court held that instruction to be adequate and rejected petitioners' contention that the "agreement had to be *express*." *Ibid.* The court relied on *Evans* v. *United States*, 504 U.S. 255 (1992), in which this Court held that a jury instruction that did not require an "express" *quid pro quo*, but did require that acceptance of the campaign contribution be in return for specific official action, satisfied *McCor-*

mick. Pet. App. 18a-19a (discussing *Evans*, 504 U.S. at 258, 268). Here, the instruction that required an agreement covering specific action, the court of appeals explained, prevented prosecution of a campaign contribution based on only a "generalized expectation of some future favorable action." *Id.* at 19a. The court rejected a requirement that the agreement be memorialized in writing or, as petitioners had suggested, "overheard by a third party"; "[s]ince the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no requirement that it be *express*." *Id.* at 20a. The court also stated that "an explicit agreement may be 'implied from [the official's] words and actions.'" *Ibid.* (quoting *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment) (brackets in original)).

As to the conspiracy and substantive honest-services counts, the court concluded that any failure to adequately instruct the jury on a *quid pro quo* requirement was harmless in light of the *quid pro quo* instruction on the bribery counts. Pet. App. 21a n.17.

b. The court held that the evidence was sufficient to prove an explicit *quid pro quo*. Pet. App. 22a-26a. The court found that Bailey's testimony about his July 1999 conversation with Siegelman, in which Siegelman showed him the IHS check and stated, *inter alia*, that Scrushy was halfway to $500,000 and wanted an appointment to the CON Board, see p. 4, *supra*, "was competent evidence that Siegelman and Scrushy had agreed to a deal in which Scrushy's donation would be rewarded with a seat on the CON Board." Pet. App. 24a. The court also found probative evidence of petitioners' illicit *quid pro quo* in: Bailey's repeated testimony that petitioners had an explicit agreement to exchange money for

a seat on the CON Board; Bailey's testimony about Siegelman's solicitation of the $500,000 payment through Hanson; Martin's corroborating testimony that the contribution was in exchange for the CON Board seat; Martin's testimony that Hanson once bragged about getting HealthSouth a CON Board seat with the help of the IHS check; Cline's testimony that the IHS check was from Scrushy, that "another $250,000 * * * would be coming," and that receipt of the checks was not reported until after the AEF's finances came under scrutiny; McGahan's testimony about Scrushy's solicitation of the first contribution from him; testimony from the HealthSouth lawyer responsible for HealthSouth political contributions that she was told nothing about the $500,000 in contributions; and "the close relationship in time between the first check and Siegelman's appointment of Scrushy" to the CON Board. *Id.* at 25a, 26a; see *id.* at 24a-26a.

c. The court held that the evidence was insufficient to support Siegelman's mail fraud convictions on Counts 8 and 9, which were based on Scrushy's use of the corruptly obtained CON Board seat to further HealthSouth's interests. The court found no evidence from which the jury could infer that Siegelman knowingly had agreed to a scheme to defraud that included, not only his appointment of Scrushy to the CON Board for $500,000, but also Scrushy's self-dealing once on the CON Board. Pet. App. 26a-33a.

d. The court held that the evidence was sufficient to support Siegelman's conviction for obstructing justice. Count 17 alleged two separate bases for Siegelman's violation of 18 U.S.C. 1512(b)(3): that, with intent to hinder, delay, or prevent the communication of information to the FBI about offenses related to the $9200 pay-

ment, Siegelman corruptly persuaded Bailey to write and give him a check for $2973.35 with the false notation "balance due on m/c"; and that Siegelman engaged in misleading conduct toward another person. The court found the evidence sufficient to support conviction under either prong. Pet. App. 36a-44a.

With respect to corrupt persuasion, the court stated that the evidence showed that "Siegelman knew and agreed that Bailey would disguise Young's payment to Siegelman as a loan to Bailey to buy the motorcycle by 'paying back' Young with his own check," and that Siegelman had accepted and cashed the $2973.35 check with the notation that it was the final payment on the motorcycle. Pet. App. 42a. The jury also heard testimony that "Bailey always did what Siegelman asked him to do." *Ibid.* The court found that the jury's decision to acquit Siegelman on Count 16, which charged him with corruptly persuading Bailey to write the $10,503.39 check, showed that the jury had carefully considered the obstruction charges, and had concluded that "by the time Bailey wrote the check to Siegelman for $2793.35 [*sic*], just over four months later, as a final step in the coverup," Siegelman "was directing the coverup by persuading Bailey to write the check to him." *Ibid.*

With respect to misleading conduct, the court found "the evidence * * * more than sufficient to support the jury's finding that the delivery of the final check in the presence of the two lawyers and the use of the lawyers to 'finalize' the sale of the motorcycle to Bailey was an attempt to 'create witnesses as part of a coverup and to use unwitting third parties or entities to deflect the efforts of law enforcement agents in discovering the truth.'" Pet. App. 43a (quoting *United States* v. *Veal*, 153 F.3d 1233, 1247 (11th Cir. 1998), cert. denied, 526

U.S. 1147 (1999)). The jury reasonably could infer, the court explained, that Siegelman "intended to mislead the lawyer into believing that the transaction was legitimate," *i.e.*, that Bailey had, all along, been purchasing the motorcycle from Siegelman. *Id.* at 44a. "As the 'unwitting third party,'" the court concluded, "the lawyer would be in a position factually to support the cover up since Siegelman clearly knew that there was a 'possibility' that the federal investigators would come asking." *Ibid.*[3]

ARGUMENT

1. Petitioners, supported by Siegelman's amici, renew their argument (Pet. 10-17; 09-182 Pet. 11-23) that *McCormick* v. *United States*, 500 U.S. 257 (1991), requires proof of an "express" *quid pro quo* and that the *quid pro quo* may not be implied from circumstantial evidence. Those contentions lack merit, and the court of appeals' resolution of those issues does not warrant further review.

a. Contrary to petitioners' contentions (Pet. 13-17; 09-182 Pet. 13-16, 20, 22), the decision below does not conflict with that of any other circuit. None of the decisions that petitioners cite supports the proposition that a heightened standard of "explicit" proof is required in campaign-contribution cases. Indeed, as Siegelman effectively concedes (09-182 Pet. 22), the cases on which petitioners rely did not involve campaign contributions at all.

The Ninth Circuit has long since rejected the requirement of a "verbally explicit" *quid pro quo* that peti-

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[3] The court of appeals also denied relief on petitioners' remaining claims, none of which petitioners present here. See Pet. App. 34a-35a, 44a-66a.

tioners urge here. *United States* v. *Carpenter*, 961 F.2d 824, 827 (9th Cir.), cert. denied, 506 U.S. 919 (1992). In reviewing the sufficiency of the evidence supporting a state senator's conviction for accepting and soliciting campaign contributions, *id.* at 825, the Ninth Circuit explained (even before *Evans* v. *United States*, 504 U.S. 255 (1992)) that "what *McCormick* requires is that the quid pro quo be clear and unambiguous, leaving no uncertainty about the terms of the bargain." *Id.* at 827. Moreover, "[t]he jury may consider both direct and circumstantial evidence, including the context in which a conversation took place, to determine if there was a meeting of the minds on a quid pro quo." *Ibid.* *Carpenter* makes clear that in the Ninth Circuit, the understanding between official and contributor "need not be verbally explicit." *Ibid.*

Since the petitions were filed, the Ninth Circuit has confirmed that it adheres to *Carpenter*. That court recently reiterated: "An official may be convicted without evidence equivalent to a statement such as: 'Thank you for the $10,000 campaign contribution. *In return for it*, I promise to introduce your bill tomorrow.'" *United States* v. *Inzunza*, 580 F.3d 894, 900 (2009). Rather, "the proof may be circumstantial." *Id.* at 901. The Eleventh Circuit's holding that an explicit agreement for a public official to exchange specific action for a campaign contribution can be established even if not shown to be express, Pet. App. 17a, is fully consistent with the Ninth Circuit's description of the requirements for an explicit *quid pro quo*.

The decision in *United States* v. *Kincaid-Chauncey*, 556 F.3d 923 (9th Cir. 2009), petition for cert. pending, No. 09-5076 (filed June 29, 2009), does not announce a different rule for campaign-contribution cases. In-

deed, as noted above, *Kincaid-Chauncey* did not involve campaign contributions at all. See *id.* at 927-929.[4] Siegelman's suggestion (09-182 Pet. 22) that dictum in *Kincaid-Chauncey* could nonetheless justify review on the theory that it might deter prosecution in future campaign-contribution cases is without merit, as the subsequent decision in *Inzunza* illustrates.

Similarly, the Second and Sixth Circuit decisions that petitioners cite do not establish any conflict. Those cases, like *Kincaid-Chauncey*, did not involve campaign contributions. See *United States* v. *Abbey*, 560 F.3d 513, 515, 518 (6th Cir. 2009), petition for cert. pending, No. 09-5496 (filed July 20, 2009); *United States* v. *Ganim*, 510 F.3d 134, 137-140 (2d Cir. 2007) (Sotomayor, J.), cert. denied, 128 S. Ct. 1911 (2008). Although each case made passing references to the campaign-contribution context, those references were dicta; neither case can be read to establish a heightened "express" standard in that context. And both cases seemed to base the contrast between campaign-contribution cases and cases involving other types of payments on whether there must be an explicit promise to perform a "particular act" (*Ganim*, 510 F.3d at 144) or "particular, identifiable act" (*Abbey*, 560 F.3d at 518) at the time of payment in a campaign-contribution context, as opposed to the official's understanding that he was expected to benefit the payor "as specific opportunities arose" (*Ganim*, 510 F.3d at 144; *Abbey*, 560 F.3d at 518) in cases involving other types of gifts or payments. There can be no doubt in

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[4] Kincaid-Chauncey testified at trial that one of the four cash payments she received was a campaign contribution to pay debts incurred by her son's unsuccessful campaign for city council, but she appealed only the district court's treatment of payments that were *not* contributions. See 556 F.3d at 928, 938, 944 n.16.

this case that petitioners had to "*agree* that the official will take *specific* action in *exchange* for the thing of value," Pet. App. 18a-19a, thus satisfying any specificity requirement that *Ganim* or *Abbey* might imply.[5]

Thus, because the Ninth Circuit agrees with the Eleventh Circuit that an explicit agreement can be inferred from circumstantial evidence, and because the statements by the Second and Sixth Circuits on which petitioners rely are dictum and appear to address a distinct issue, this case presents no conflict that might warrant review by this Court.

b. The court of appeals correctly concluded that the district court was not required to instruct the jury that it could convict only if the government proved an "explicit *quid pro quo*," by which petitioners mean "an actual communication from the official, promising the action in exchange for the contribution," 09-182 Pet. 7, or "articulated commitments, not inferences or implications," Pet. 10. That decision is consistent with this Court's decisions and does not warrant further review.

Petitioners rely entirely on a single word in the Court's opinion in *McCormick*: the reference to a political contribution "made in return for an *explicit* promise

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[5] Siegelman's amici (Former AGs' Br. 17) also cite *United States* v. *Antico*, 275 F.3d 245, 257 (3d Cir. 2001), cert. denied, 537 U.S. 821 (2002), and *United States* v. *Taylor*, 993 F.2d 382, 385 (4th Cir.), cert. denied, 510 U.S. 891 (1993). *Antico*, like the Second and Sixth Circuit decisions discussed above, did not involve campaign contributions, see 275 F.3d at 249-254, 258, and the court of appeals "echo[ed] the Supreme Court's satisfaction with an implicit *quid pro quo* requirement." *Id.* at 258. In *Taylor*, which did involve campaign contributions, the jury had been instructed that "'[t]here need be no specific *quid pro quo*'" at all, which was erroneous under *McCormick* without regard to the standards by which the government *might* have proved a *quid pro quo*. 993 F.2d at 385.

or undertaking by the official to perform or not to perform an official act." 500 U.S. at 273 (emphasis added). Even read in isolation, that sentence does not address the manner in which an agreement is to be proved at trial. Indeed, in *McCormick* there had been no instruction to find a *quid pro quo* at all, "explicit" or otherwise, *id.* at 274, and the government agreed that if the payments to McCormick were properly regarded as campaign contributions (as the lower court had held they should not be, *id.* at 271-272, 274-275) then proof of a *quid pro quo* would be required. *Id.* at 273. Thus, as the Court has subsequently made clear, *McCormick* does not impose petitioners' desired requirement (Pet. 9) that the *quid pro quo* be proved by "direct evidence."

One year after *McCormick*, this Court elaborated on the *quid pro quo* requirement in *Evans*, *supra*. Evans, a county commissioner, accepted $8000 purportedly as a contribution to his reelection campaign, "knowing that it was intended to ensure that he would vote in favor of the [donor's] rezoning application and that he would try to persuade his fellow commissioners to do likewise." *Id.* at 257. The Court held that Evans's violation of the Hobbs Act was complete when Evans "receive[d] a payment in return for his agreement to perform specific official acts," *id.* at 268; the government did not have to prove that Evans initiated the transaction or that he carried out his part of the *quid pro quo*. *Id.* at 265-268.

Evans had also challenged a jury instruction on the ground that it failed to "properly describe the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution." 504 U.S. at 268. The Court held that the instruction, similar to the one here, "satisfie[d] the *quid pro quo* requirement of *McCormick*." *Ibid.* The instruction provided:

> [I]f a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Id. at 258 (second brackets in original). The Court upheld the instruction because "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Ibid.*

The court of appeals correctly concluded (Pet. App. 18a-21a) that the bribery instructions comported with *McCormick* and *Evans* by requiring the jury to find that petitioners "agree[d]" that Siegelman would take "specific action" in exchange for the $500,000 contribution from Scrushy. 09-182 Pet. App. 64a. That language materially tracked the instruction approved in *Evans*. By requiring a meeting of the minds covering the specific terms of the exchange, the instruction prevented conviction based on a finding that the $500,000 was given or received with only an *expectation* of future official action by Siegelman benefitting Scrushy—a scenario allowed by the flawed instructions in *McCormick*, 500 U.S. at 261 n.4.[6] As the court of appeals explained, under *Evans*, "[s]ince the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no

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[6] In light of the court of appeals' holding that an agreement covering specific action is required, amici's contention (Former AGs' Br. 13) that the standard applied below would permit conviction "whenever [an official] performs an official act and the prosecution presents evidence that he accepted a contribution from a donor who desired that such act take place" is wrong.

requirement that it be *express*." Pet. App. 20a; accord, *e.g.*, *United States* v. *Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) ("Explicit, as explained in *Evans*, speaks not to the form of the agreement between the payor and payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated."), cert. denied, 514 U.S. 1095 (1995).

The court of appeals was likewise correct in concluding that the jury could rely on circumstantial evidence of an agreement to exchange money for specific official action. See Pet. App. 24a ("Inferring actors' states of mind from the circumstances surrounding their conversation, from their actions, and from their words spoken at the time is precisely the province of the jury."). As Justice Kennedy stated in *Evans*:

> The criminal law in the usual course concerns itself with motives and consequences, not formalities. And the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.

Evans, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment); accord *McCormick*, 500 U.S. at 270 ("It goes without saying that matters of intent are for the jury to consider."). In rejecting a vagueness challenge to a statute, this Court recently reaffirmed that "courts and juries every day pass upon knowledge, belief and intent—the state of men's minds —having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *United States* v. *Williams*, 128 S. Ct. 1830, 1846 (2008) (quoting

American Commc'ns Ass'n v. *Douds*, 339 U.S. 382, 411 (1950)).

Petitioners' and amici's attempts to distinguish *Evans* (Pet. 11-12; 09-182 Pet. 12-13, 17; Former AGs' Br. 13-14) are unavailing. First, Scrushy incorrectly asserts (Pet. 11) that "*Evans* was not a campaign contribution case." In fact, Evans contended that all of the payments were contributions (even reporting one as such); the instructions required the jury to apply the same standard regardless of whether they were contributions; and this Court assessed the adequacy of the instruction under *McCormick*. See *Evans*, 504 U.S. at 257-258, 267-268; see also *id.* at 278 (Kennedy, J., concurring in part and concurring in the judgment) ("Readers of today's opinion should have little difficulty in understanding that the rationale underlying the Court's holding applies *not only* in campaign contribution cases, but in all § 1951 prosecutions.") (emphasis added).

Nor can petitioners distinguish *Evans* on the theory that the primary question presented was whether an affirmative act of inducement (such as a demand) by a public official is an element of extortion under color of official right. See Pet. 12; 09-182 Pet. 12-13; Former AGs' Br. 14. Evans directly challenged the adequacy of the jury instructions under *McCormick* on the ground that passive acceptance of a campaign contribution based on a specific requested exercise of official power is not a *quid pro quo* unless the official complies or attempts to comply with the request. Pet. Br. at 23, 46-47, *Evans*, *supra* (No. 90-6105). Rejecting that challenge, the Court concluded that the instruction "satisfie[d] the *quid pro quo* requirement of *McCormick*." *Evans*, 504 U.S. at 268. It is doubtful that the Court would have so clearly approved the instruction in *Evans* if, in fact, the

instruction was flawed under the standard announced just one Term earlier in *McCormick*. And, by clarifying that "knowing that the payment was made in return for official acts" is enough," *Evans* "gave content to what the *McCormick quid pro quo* entails." *Blandford*, 33 F.3d at 696.

c. Contrary to the suggestions of petitioners and amici (Pet. 12-13; 09-182 Pet. 19-20; Former AGs' Br. 19-20), the decision below does not "open to prosecution" the ordinary giving and receiving of campaign contributions. *McCormick*, 500 U.S. at 272. The requirement that the official and payor *agree* to exchange a contribution for *specific* action precludes liability from attaching to contributions made and received with only a generalized expectation of future official action; it therefore "defines the forbidden zone of conduct with sufficient clarity." *Id.* at 273; see *Carpenter*, 961 F.2d at 827 ("When a contributor and an official clearly understand the terms of a bargain to exchange official action for money, they have moved beyond 'anticipation' and into an arrangement that the Hobbs Act forbids."). Moreover, as discussed above, a jury is fully capable of determining, based on direct or circumstantial evidence, whether a public official and a payor have entered into an agreement to exchange specific action for a contribution. See, *e.g.*, *Inzunza*, 580 F.3d at 901 ("The circumstances of the promises, including their covert nature, their detail, and the deception in carrying them out, were such that the jury could connect them causally to campaign contributions privately made at or near the same time.").

By contrast, a rule requiring an "express" promise or undertaking between the payor and the official would allow the evasion of criminal liability through "knowing

winks and nods," *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment), even where (as the jury found here) the parties had a meeting of the minds and agreed to exchange money for official action. See also, *e.g.*, *Carpenter*, 961 F.2d at 827. Under a standard that requires not just a *quid pro quo*, but one that is verbally spelled out with all "i"s dotted and "t"s crossed, all but the most careless public officials will be able to avoid criminal liability for exchanging official action for campaign contributions.

Finally, the facts of this case do not bear out Siegelman's and amici's concerns that without an express *quid pro quo* standard, First Amendment activity will be chilled or arbitrary or unjust prosecutions will result. 09-182 Pet. 19-20; Former AGs' Br. 19-27. The evidence amply proved not only that petitioners (through Hanson) negotiated an agreement to exchange $500,000 in contributions to the lottery campaign for membership on the CON Board, but that they understood and faithfully executed the agreement's terms. See Pet. App. 22a-26a; see also pp. 2-7, *supra*. Petitioners also took steps to conceal their corrupt agreement. For example, Scrushy structured the first $250,000 payment to come from a third party (ultimately, an out-of-state corporation) and hid both payments from the HealthSouth lawyer responsible for political donations, while Siegelman had Bailey deposit the first $250,000 check into a secretly opened bank account (unbeknownst to the lottery fundraising director), and failed to report either payment until the AEF's finances came under scrutiny. See Pet. App. 7a-10a, 25a-26a. Those acts of concealment corroborate the jury's finding that petitioners acted with corrupt intent and knowledge that their conduct was

illegal. See, *e.g.*, *United States* v. *McDowell*, 250 F.3d 1354, 1366-1367 (11th Cir. 2001).[7]

d. Even if this case otherwise warranted review to address the courts of appeals' interpretation of *McCormick*, this case would present a poor vehicle because it would require this Court to decide a threshold question, and to answer that question in a way that no court of appeals has yet done, including the court below. The court of appeals assumed, but did not decide, that *McCormick*'s *quid pro quo* standard, announced under the Hobbs Act's proscription of extortion under color of official right, 18 U.S.C. 1951(a) and (b)(2), applies to prosecutions under the federal-funds bribery and honest-services fraud statutes. See Pet. App. 18a ("[W]hether or not a quid pro quo instruction was legally required, such an instruction was given"); *id.* at 21a ("*assuming* a *quid pro quo* instruction was required in this case, we find no reversible error").

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[7] Siegelman also challenges (09-182 Pet. 23 n.6) the sufficiency of the *quid pro quo* evidence. This Court ordinarily will not review the fact-bound question whether the evidence was sufficient in a particular case, particularly once that claim has been rejected by both the trial court and the court of appeals. See, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 124 (1974). Regardless, the court of appeals correctly held that the evidence was sufficient to prove petitioners' *quid pro quo*. See Pet. App. 22a-26a. Indeed, the care with which the court of appeals undertook its sufficiency review is evidenced by its reversal of two of Siegelman's counts of conviction. See *id.* at 26a-33a. And the court of appeals applied the correct standard of review—"whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt," *United States* v. *Powell*, 469 U.S. 57, 67 (1984)—contrary to Siegelman's unsupported contention (09-182 Pet. 23 n.6) that the First Amendment requires both reading an explicit *quid pro quo* element into each statute *and* reviewing the sufficiency of proof of that element *de novo*.

Both of the substantive statutes at issue here contain a scienter element different from the Hobbs Act's: federal-funds bribery required proof that petitioners acted "corruptly," 18 U.S.C. 666(a)(1)(B), and honest-services fraud required proof that petitioners acted with the intent to defraud, *i.e.*, "knowingly and with the specific intent to deceive someone," Gov't C.A. Br. 62. No court has specifically addressed whether *McCormick* applies to those statutes. The Ninth Circuit has specifically held that *McCormick* does not apply to a state bribery statute, and it rejected the contention that the First Amendment invariably requires an explicit *quid pro quo* instruction in campaign contribution cases. *United States* v. *Jackson*, 72 F.3d 1370, 1374-1376 (1995), cert. denied, 517 U.S. 1157 (1996); see also, *e.g.*, *United States* v. *Ford*, 435 F.3d 204, 209, 212-213 & n.5 (2d Cir. 2006) (contrasting the mens rea requirements under the federal-funds bribery statute and the Hobbs Act).[8]

At a minimum, *McCormick*'s application to the federal funds bribery and honest-services fraud statutes presents a significant threshold question. The court of appeals properly did not address that question in affirming petitioners' convictions; to win *reversal* based on the

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[8] Siegelman cites (09-182 Pet. 20 n.4) the Seventh Circuit's observation in *United States* v. *Allen*, 10 F.3d 405 (7th Cir. 1993), that extortion and bribery are "different sides of the same coin." *Id.* at 411. But the Seventh Circuit did not even consider the federal bribery statute, much less decide that *McCormick* controlled its interpretation: the defendant had been charged with a RICO violation with a *state* bribery offense as a predicate act, but he was acquitted, mooting the questions whether Indiana law would apply the same statutory-construction principle as *McCormick* and, if so, whether it would do so in the bribery context. The court of appeals specifically noted that it was not answering those questions. *Id.* at 411-412.

lack of a *quid pro quo* jury instruction, however, petitioners would have to prevail both on the question presented and on the threshold question. And in the absence of any conflict on either question, further review is not warranted.[9]

2. Siegelman contends (09-182 Pet. 23-29) that the evidence was insufficient to support his conviction for obstructing justice because it allegedly did not prove his intent to "hinder, delay, or prevent the communication to a law enforcement officer * * * of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. 1512(b)(3). That fact-bound contention lacks merit.

a. As a preliminary matter, this case stands in an interlocutory posture as to Siegelman.[10] The court of

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[9] Siegelman cursorily contends (09-182 Pet. 23 n.6) that, even if this Court agrees with the *quid pro quo* standard applied below, it should reverse his convictions "based on due process fairness and notice concerns" because "he could not have known that the law allowed conviction without an actually-stated express *quid pro quo*." See also Law Professors' Br. 14-15. The evidence of concealment, and hence of scienter, factually undermines Siegelman's claim. See, *e.g.*, *Williams*, 128 S. Ct. at 1846 (scienter element refutes claim that statute is indeterminate and vague). Furthermore, to the extent Siegelman now contends that the federal-funds bribery statute is unconstitutionally vague, he failed to preserve any such claim below. See Siegelman C.A. Br. 43-47.

Although the Court is considering a vagueness challenge to the honest-services statute in *Skilling* v. *United States*, cert. granted, No. 08-1394 (Oct. 13, 2009), the petitioner's contention in that case is that a private-gain requirement is necessary to save the statute from unconstitutional vagueness. Because the element of private gain is unquestionably met here, there is no need to hold Siegelman's petition pending the disposition of *Skilling*.

[10] Because the court of appeals affirmed all of Scrushy's convictions, and because both petitioners raise issues concerning *McCormick*, the

appeals reversed Siegelman's conviction on two fraud counts, vacated his sentence, and remanded his case to the district court for resentencing on the remaining five counts. And Siegelman has filed a new-trial motion in the district court attacking his convictions, including the obstruction count. Following the district court's final disposition of the case, petitioner will be able to raise his current obstruction claim—together with any other claims that may arise during resentencing—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). Review at this time is not warranted.

b. In any event, the court of appeals correctly concluded that the evidence was sufficient to support Siegelman's conviction. That fact-bound determination does not warrant further review. See 09-182 Pet. 28 (conceding that court of appeals' alleged error "was perhaps" not "a conscious disagreement on a reasonably disputable point of law").

The crux of Siegelman's claim in his opening brief on appeal was that the evidence did not prove either that he corruptly "persuaded" Bailey to write the $2973.35 check to Siegelman with the notation "balance due on m/c," or that he engaged in "misleading" conduct toward a third party. See Siegelman C.A. Br. 61-68. Only at the end of, and in connection with, his misleading-conduct argument did Siegelman challenge the evidence proving his intent to hinder, delay, or prevent the communication of information to law enforcement. *Id.* at 68-69; see also *id.* at 25-26 (omitting any contention in summary of

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interlocutory posture of Siegelman's case does not present an obstacle to this Court's review of the first question presented.

the argument that evidence was insufficient to prove statutory intent element).[11] Rejecting his sufficiency claim, the court of appeals held, first, that "[a] reasonable juror could have concluded that Siegelman persuaded Bailey (he asked and Bailey agreed) to take the final step in the cover up by giving him a $2793.35 [*sic*] check with the notation that it was final payment for the motorcycle." Pet. App. 41a. The court also found sufficient evidence "to support the jury's finding that the delivery of the final check in the presence of the two lawyers and the use of the lawyers to 'finalize' the sale of the motorcycle to Bailey" satisfied the misleading-conduct prong of Section 1512(b)(3), because it proved "an attempt to 'create witnesses as part of a cover-up and to use unwitting third parties or entities to deflect the efforts of law enforcement agents in discovering the truth.'" *Id.* at 43a (quoting *United States* v. *Veal*, 153 F.3d 1233, 1247 (11th Cir. 1998), cert. denied, 526 U.S. 1147 (1999)).[12]

The court's reference to the evidence that Siegelman and Bailey were engaged in a "cover up" and were using third parties "to deflect" the efforts of investigators reflects the court's conclusion that the evidence was suffi-

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[11] In his reply brief, Siegelman argued in more detail that the evidence did not prove his intent to "hinder, delay, or prevent" communications to law enforcement, but did so almost exclusively in connection with the misleading-conduct prong of the statute. See Siegelman C.A. Reply Br. 30-36 (misleading-conduct argument); *id.* at 28 (corrupt-persuasion argument; summarily contending that there was no evidence of "the intent that the statute proscribes").

[12] Siegelman contends that the evidence was insufficient to prove that he "persuaded" Bailey to write the check or misled Bailey's lawyer, but does not contend that the sufficiency of that evidence independently warrants a grant of certiorari. See 09-182 Pet. 24.

cient to permit the jury to find that Siegelman intended to hinder, delay, or prevent the communication of information about the $9200 payment to law enforcement. The purpose of any cover-up is to frustrate ascertainment of the truth about a crime. And here, the jury heard testimony that Siegelman was aware of the criminal investigation into his dealings with Young when he persuaded Bailey to write the $2973.35 check and that the $2973.35 check was the final step in the plan to make the $9200 payment from Young appear legitimate. Pet. App. 38a-39a. As the court of appeals found, "Siegelman clearly knew that there was a 'possibility' that the federal investigators would come asking." *Id.* at 44a. The jury reasonably could have found that, by creating false exculpatory evidence (the $2973.35 check with the notation "balance due on m/c") and an unwitting alibi witness (Bailey's lawyer), Siegelman intended to hinder, delay, or prevent the communication by Young, Bailey, or Bailey's lawyer of information related to the $9200 payment to investigators.[13] Indeed, Bailey testified that he later lied to investigators about the motorcycle transaction in order "to protect [him]self and [his] boss." *Id.* at 40a-41a.[14]

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[13] The indictment alleged that Siegelman intended to hinder, delay, and prevent the communication of information by Young, Bailey, and Bailey's lawyer.

[14] Contrary to Siegelman's contention (09-182 Pet. 23), the government did argue on appeal that the evidence supported a finding of intent within the language of the statute. See Gov't C.A. Br. 94-95 ("Siegelman's intent was to hinder, delay, or prevent the communication to law enforcement concerning a potential federal offense because, as Bailey testified, Siegelman was then aware of the federal-state investigation and the $2,973.35 transaction was the final step in the cover-up.").

Siegelman contends that the intent prong of Section 1512(b)(3) is limited to a defendant's "efforts to stop or keep people * * * from providing information to law enforcement, or at least to slow them down," 09-182 Pet. 25, and that the jury allegedly heard no evidence that Bailey or his lawyer would have been willing to provide inculpatory information to law enforcement, *id.* at 26-27. Those arguments are misplaced. First, Siegelman effectively reads the term "hinder" out of Section 1512(b)(3). Whether or not Siegelman believed that Young or Bailey (or Bailey's lawyer, on behalf of Bailey) would have communicated information about the $9200 payment on his own initiative, the jury reasonably could have found that, by engaging with Young and Bailey in a cover-up, Siegelman intended to hinder their communication of information to law enforcement, because the $2973.35 transaction locked in Siegelman's, Bailey's, and Young's cover story about the $9200 payment. Indeed, Siegelman even tried to use the cover-up to his advantage at trial by introducing the bill of sale for the motorcycle. Pet. App. 44a n.25.

Second, even under Siegelman's view of the statute, the jury reasonably could have found that he was aware of the possibility that Young or Bailey might become a cooperating witness—as each one ultimately did—and might (with the support of a lawyer) provide inculpatory information to investigators. See *United States* v. *Romero*, 54 F.3d 56, 62 (2d Cir. 1995) (holding that under Section 1512(a)(1)(C), which criminalizes murder with intent to prevent communication to law enforcement, government need only show defendant's "intent to frustrate the individual's *possible* cooperation with federal authorities"; "victim need not have agreed to cooperate with any federal authority or even to have evinced

an intention or desire to so cooperate") (emphasis added), cert. denied, 517 U.S. 1149 (1996); cf. *Veal*, 153 F.3d at 1251-1252 (requiring only a "*possibility* or *likelihood* that * * * false and misleading information would be transferred to federal authorities").

Finally, with respect to Siegelman's use of an unwitting third party (Bailey's lawyer) as a conduit for the false evidence, the jury reasonably could have found that Siegelman intended to "hinder, delay, or prevent" the lawyer from communicating information about the $9200 payment to law enforcement by giving the lawyer a false understanding of events so that he "would be in a position factually to support the cover up" when investigators came calling. Pet. App. 44a. See *United States* v. *Applewhaite*, 195 F.3d 679, 683, 686-688 (3d Cir. 1999) (upholding Section 1512(b)(3) conviction that was based on attempt to hinder communication to law enforcement by persuading third party who was not involved in underlying crime to provide false alibi); see also *Veal*, 153 F.3d at 1247 (holding that Section 1512(b)(3) covers "activities designed to create witnesses as part of a cover-up and to use unwitting third parties or entities to deflect the efforts of law enforcement"). The court of appeals' fact bound conclusion that the evidence was sufficient to support Siegelman's conviction was correct and does not warrant review.

c. Neither case cited by Siegelman conflicts with the decision below. See 09-182 Pet. 26, 28 (citing *United States* v. *Genao*, 343 F.3d 578 (2d Cir. 2003), and *United States* v. *Hertular*, 562 F.3d 433 (2d Cir. 2009)). In *Genao*, the court stated that Section 1512(b)(3) "requires a specific intent to interfere with the communication of information," and it held that the indictment was deficient for failing to allege "why [the defendant] lied

to the investigators." 343 F.3d at 586. Here, the indictment (which Siegelman does not challenge) tied the statutory intent element to the $9200 payment, and the evidence proved Siegelman's intent as alleged. In *Hertular*, the court found sufficient evidence to support the defendant's conviction under Section 1512(b)(3) because it proved his "specific intent * * * to hinder or prevent not simply the filing of an indictment but any communication to or among federal law enforcement officials that could lead to his indictment." 562 F.3d at 433. The same conclusion applies here. Siegelman's intent was not generally to avoid indictment for the $9200 payment from Young; the purpose of creating false evidence and an alibi witness was to hinder, delay, or prevent the communication of *any* incriminating information if "the federal investigators [came] asking." Pet. App. 44a. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2009

No. 09-182

IN THE

Supreme Court of the United States

DON EUGENE SIEGELMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

Petitioner, Governor Don Siegelman, respectfully submits as follows.

1. The first question concerns the meaning of the "explicit *quid pro quo*" standard of *McCormick v. United States*, 500 U.S. 257 (1991), as the dividing line between crime and politics in situations where it is suspected that an official's actions were influenced by campaign contributions. *See id.* at 271 & n.9 (repeatedly referring to the issue in terms of "explicit *quid pro quo*"). This Court adopted that line for the avowed purpose of bringing clarity to the law. *Id.* at 272-73. This Court recognized that a standard allowing prosecution on lesser proof would put politicians and donors in jeopardy of criminal conviction

for doing things that are unavoidable in our electoral and campaign-finance system. *Id.*

The clarity that this Court sought to create in *McCormick* has broken down. The situation has become even more dire since we filed our Petition. The Ninth Circuit's new decision in *United States v. Inzunza*, 580 F.3d 894 (9th Cir. 2009) shatters the already-broken understanding of the law into even smaller shards.

Inzunza is good in one respect: it holds that the *McCormick* "explicit *quid pro quo*" standard applies to honest services cases, just as it does under the Hobbs Act. This holding is demonstrated by the fact that, using that standard as the court had described it previously in its opinion, the court upheld a judgment of acquittal for one of the defendants on the honest services as well as the Hobbs Act charges. 580 F.3d at 911-912. Therefore, the Government is wrong in claiming (BIO p. 24) that no court has yet definitively applied the *McCormick* standard to a campaign contribution case brought under the honest services law.

But what is the *McCormick* standard? That's the problem, and *Inzunza* makes it worse.

At the time of the Petition, as we showed, the disagreement was basically a two-sided debate. The two sides disagreed on whether an "explicit *quid pro quo*" agreement, promise or undertaking really has to be "explicit" in the sense of "express." And, as we showed, this disagreement is doctrinally based in a disagreement as to whether *Evans v. United States*, 504 U.S. 255 (1992), diluted the *McCormick* standard for campaign-contributions cases, or whether instead

Evans diluted the *quid pro quo* standard only for cases not based on campaign contributions.

On one side of that divide was the Eleventh Circuit, declaring here that *Evans* diluted the *McCormick* standard in campaign contribution cases, and that "explicit" does not have its normal meaning of "express" after *Evans*. On the other side were cases including *United States v. Ganim*, 510 F.3d 134 (2d Cir. 2007) (Sotomayor, J.) equating "explicit" with "express," and treating Evans as having modified the *McCormick* standard for those cases that do not involve campaign contributions. (We quoted some striking parts of *Ganim* in our Petition, p. 15. The Government tries to minimize *Ganim* as being just dicta and mostly about other things, but the parts we quoted are clear and decisive.)

But now comes *Inzunza*, in which the Ninth Circuit shatters the understanding further. The Ninth Circuit declares that *McCormick*'s "requirement of explicitness refers to the promise of official action, not the connection between the contribution and the promise." *Inzunza*, 580 F.3d at 900. Indeed, the Ninth Circuit goes so far as to intimate that the connection between contribution and official action doesn't necessarily have to be an agreement or understanding between the official and the contributor at all, not even an implicit one; rather, at one point the Ninth Circuit describes the necessary connection only as a "causal[]" one. *Id.*

This Ninth Circuit view—that only the official's statement as to what action he will take must be explicit, but that the connection between that action and the campaign contribution does not have to be explicit in any sense at all—is dramatically different from the Eleventh Circuit's. On the Eleventh Circuit's

repeatedly-stated, firm and indeed correct understanding, the "agreement" linking the action and the contribution is what must be "explicit." [Pet App. 16a, 17a, 18a, 19a, 561 F.3d at 1226, 1227]. (The Eleventh Circuit went wrong, though, in concluding that "explicit" means something like "about a specific official action, even if only implicit," rather than meaning "express.") Other courts agree that it is the agreement, the connection between contribution and action, that must be "explicit." *See, e.g., United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) ("[T]he Supreme Court in *McCormick* added . . . the requirement that the connection between the payment and the exercise of office—the quid pro quo—be explicit.")

So the situation is at least a three-way debate now. The Ninth Circuit demands an "explicit *quid*"—an explicit promise as to what action the official will take[1]—but only an implicit "*pro quo*." The Eleventh Circuit accepts even an "implicit *quid*"—since it does not even require that the promise of official action be explicit in the ordinary sense of that word—and an "implicit *pro quo*." The Second and Sixth Circuits, at least, appear by their opinions to believe in a truly "explicit *quid pro quo*" standard for campaign contribution cases, as shown in the Petition. The law is a mess.

Governor Siegelman would prevail under any of the various standards that have been adopted outside the Eleventh Circuit. He would prevail even under the Ninth Circuit's *Inzunza* pronouncement that only the promise of official action, not the connection to

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[1] As shown in the Petition (p. 15), "explicit" means "express" in the Ninth Circuit.

the contribution as *quid pro quo*, needs be "explicit." He would prevail under that standard because there is literally no evidence that he promised Scrushy, or anyone else, that he would appoint Scrushy to the C.O.N. Board. Recall even the words of Government star witness Bailey [Pet. App. 7a], purporting to recount a conversation that occurred after Siegelman had met with Scrushy and received a contribution. It was, in Bailey's telling, future tense and even subjunctive: what is Scrushy "going to want," "I wouldn't think that would be a problem, would it?" and the Governor replying, "I wouldn't think so." Not "I told him it was no problem," and not even, for that matter, "No, it's not a problem." There is no hint that the Governor had promised the appointment, and this evidence—which is the closest the Government came—shows an expectation rather than a promise at best.

In sum, there is stark confusion in the lower courts, about what it takes to turn campaign fundraising, along with political action that benefits some donor, into a crime. The Government wants this Court to hold out on granting certiorari in any such case until there is a Circuit split of perfect crispness, with nothing that can be portrayed as having been dicta, no anterior questions that must be addressed even if they are easy ones, nothing to detract from pure simplicity. To the Government, this is a set of questions that can wait and wait until someday, if ever, when the absolutely perfect vehicle carrying a lovely Circuit split arises.

As explained in the *amicus* briefs of a bipartisan group of former State Attorneys General, and of a group of law professor scholars, the present confusion must not be allowed to last. This is no ivory-tower

exercise. It presents the real risk that federal prosecutors will follow different understandings of the law, in determining which cases to pursue, depending on where they live. Nor is this one of those arcane questions, interesting mostly to lawyers, where regional disagreement can be allowed to linger for years without serious adverse consequences to any real-world interests. This mess presents serious dangers for all elected officials in the nation. It presents serious dangers for private citizens, too. Consider a prominent person in any State who would like to be appointed to the Board of his *alma mater* public university—an extremely common desire for politically savvy people to harbor. That person now cannot know whether hosting a fundraiser for the Governor would be a great idea, or a ticket to jail at the hands of a headlines-seeking prosecutor. Consider a banking industry lobbyist who has always contributed heavily to Senate Banking Committee members, and lobbied them for official actions. Now she has to fear that if a Senator promises to take one of those requested actions, she could be indicted if some particularly suspicious-minded prosecutor believes in retrospect that there was an implicit causal connection with all those contributions. This is a mess, which this Court can and should resolve in this case.[2]

2. The second issue pertains to 18 U.S.C. § 1512(b)(3), and the required element of proof of "intent to . . . hinder, delay, or prevent" communication to law enforcement.

The Government does *not* argue that this issue was unpreserved, either in the District Court or on

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[2] This Court should, at least, hold this Petition pending resolution of the various already-granted cases that involve "honest services."

appeal. Stopping far short of any such contention, the Government only muses about *how* Governor Siegelman preserved it. This is no basis for denying review. Governor Siegelman expressly presented to the Court of Appeals the very argument that is the basis for this issue, including a lengthy discussion in his reply brief. The Government admits as much. (BIO pp. 27-28).[3] Governor Siegelman also made the point directly again at oral argument. The Court of Appeals had the square chance to rule on this issue. The Court of Appeals did not suggest that any part of Governor Siegelman's argument was unpreserved. And this Court's jurisdiction is unquestioned.

The Government also suggests (BIO pp. 26-27) that this issue arises in an "interlocutory" posture because Governor Siegelman faces resentencing, and because he has a new-trial motion pending. The pendency of the new-trial motion is a throwaway argument. This is shown by the fact that Scrushy has the same motion pending, yet the Government does not contend that his petition is interlocutory in any sense. And the other pending matter—resentencing, after reversal of two counts of conviction—is no reason to deny review. The Court of Appeals has given its final word on the validity of this count of conviction, and the issue is now squarely presented to this Court. Again this Court's jurisdiction is unquestioned. And the Government offers no reason to believe that review would be more efficient if it was postponed

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[3] Governor Siegelman noted the absence of proof of the relevant intent, both as to the alleged misleading of Bailey's lawyer and as to the alleged persuasion of Bailey. As to the latter, *see* Siegelman Reply Brief in CA11, pp. 28, 35 n.8. Siegelman also showed that there was no evidence that he even persuaded Bailey; as noted in the Petition (p. 24), on merits review this Court should agree on that point as well.

until after a sentencing proceeding that will neither change this issue nor make it moot. The Government is merely placing hurdles for the sake of placing hurdles.

Turning to the merits, the Government contends that it did prove the requisite intent to "hinder, delay or prevent" communication to law enforcement, either by Bailey's lawyer or by Bailey and Young.

As to Governor Siegelman's supposed intent vis-à-vis Bailey's lawyer, the Government's current position (BIO p. 31) seems to be that the intent was to get the lawyer to tell law enforcement that the motorcycle sale transaction was legitimate. Trying to bring this within § 1512(b)(3), the Government is forced to argue that the statute covers giving incorrect information to a person with the intent that the person will then pass it along to law enforcement, regardless of whether the person would have otherwise communicated anything to law enforcement at all.

In this, the Government is fighting against the plain language of the statute. Congress could write an obstruction statute that covered intentionally promoting the communication to law enforcement of information that the Government claims to have been false. But § 1512(b)(3), by its plain terms, is not such a statute. It covers only efforts to "hinder, delay or prevent" communications to law enforcement. An intent to make a person into a favorable witness, where absent such efforts the person would not have had anything either good or bad to tell law enforcement, does not come within this scope; it doesn't constitute the intent to hinder, to delay, or to prevent communications under any normal interpretation of those words. (The Government hints (BIO p. 30) that it believes that "hinder" has some meaning that is

markedly different from "delay" and "prevent," giving this statute a broad scope. If that is the Government's position, it is contrary to normal English usage.)[4]

As to Governor Siegelman's supposed intent vis-à-vis Bailey and Young, the Government contends that Governor Siegelman's intent, when getting this final check from Bailey for the remaining purchase price of the motorcycle, was to get Bailey and Young "locked in" to the story that Bailey had bought a motorcycle from Governor Siegelman with a loan from Young. (BIO p. 30). And he wanted to get them "locked in," the Government's story goes, because he was thinking something like "That will make it harder for them to tell the federal investigators incriminating things about all of us."

This an absurd fantasy with no basis whatsoever in the evidence. Among other things, this story is utterly destroyed by the undisputed fact—from testimony of Government star witness Bailey himself—that it was *his* idea to portray himself as having received a loan from Young so that he could purchase the motorcycle from Governor Siegelman, and then it was *his* idea to pay Young back once he found that an investigation was ongoing. It had been Bailey who

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[4] The Government cites *United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999), as a § 1512(b)(3) case that involved feeding false information to someone with the intent that he pass it on to law enforcement. But that decision did not discuss the issue that we are presenting here; there is no indication that any party argued that there is a distinction between creating false information on the one hand, and hindering, delaying or preventing the communication of information on the other hand. The Government also cites *United States v. Veal*, 153 F.3d 1233 (11th Cir. 2009); but that is one of the idiosyncratic cases that we distinguished in the Petition at 27, n.9.

had, at the outset, suggested that Young give money to him, not to Governor Siegelman, so that he could purchase the motorcycle. [Trial Transcript p. 459 ("I made the suggestion that Lanny [Young] give me the money and let me give it to the Governor rather than Lanny giving the money directly to the Governor. . . . I didn't think it was appropriate for Lanny to be in partnership with the Governor on a motorcycle . . .")]. And later, as Bailey further said, "I found out about the investigation that was going on with Lanny. . . . I wanted to repay Lanny's $9200. I did it in the form of a check." [Trial Transcript p. 475].

So Bailey and Young were, undisputedly, fully locked in to that version of events, by their own doing, well before the events took place that are the basis of this count of conviction. The one and only thing for which Governor Siegelman was convicted under § 1512(b)(3), was the last check that came at the tail end of this sequence; it was Bailey's payment of the final bit of the motorcycle's purchase price to Governor Siegelman. There is no reason to believe that Governor Siegelman had any thought, at that moment, that he needed to "lock in" Bailey and Young to anything; they had locked themselves as tightly as they could already. They were already fully committed to the principle that this had been a purchase of a motorcycle by Bailey with a loan from Young. In suggesting that Governor Siegelman harbored the specific intent that he needed to lock them into that supposedly false account at the very end of the whole chain of events, the Government is making up a story with no basis in reality.

By this point, the Court may be thinking that the Government has made this a fact-bound issue. Still, however, there is a live legal issue about the meaning

of the statute's words, as well as about whether this conviction was warranted under the law. And, we submit, the Government's obfuscatory tactics in opposing certiorari on this issue—throwing up frivolous procedural hurdles, twisting the statute's language, and running roughshod over the facts—show that this count of conviction deserves serious attention from the Court, to ensure that justice is done.

CONCLUSION

A common thread linking the two issues here is that there are prosecutors who, even if only rarely, sometimes ask the federal criminal code to conform itself to their intuitions. A case can start with prosecutorial disapproval of a person or situation, and the laws are then treated as a malleable set of words that can be pressed as necessary to match the intuition and to permit a conviction. Whether it takes the form of expanding discretion under ambiguous statutory language as in the first question, or ignoring the boundaries set by clear statutory language as in the second, such an approach to the law is dangerous to liberty whenever it appears. In prosecutions of elected officials and cases implicating First Amendment interests, like this one, it is also dangerous to our system of democracy. This Court should grant review on both questions.

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DON EUGENE SIEGELMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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INTEREST OF *AMICI CURIAE*

Amici, who are listed on the inside cover, are former state Attorneys General of the United States who have all at one time served as the chief legal officer and/or law enforcement officer of their respective states.[1] This nonpartisan group of former elected and appointed state officials share an interest in the manner in which the laws of the United States are enforced throughout the country. Of particular importance to this case, *Amici* are concerned that public officials may be prosecuted and convicted for conduct at the core of the First Amendment—contributions to electoral or issue-advocacy campaigns—based on an "implicit" *quid pro quo* standard that has been unequivocally rejected by this Court in such circumstances. The Eleventh Circuit's decision here permits the government to impose criminal penalties upon conduct that has never been defined as criminal, based on circumstantial evidence of a public official's unspoken state of mind. Because this unprecedented decision sharply conflicts with the stringent protections that this Court has afforded the giving and

[1] The parties have consented to the filing of this brief. Letters of consent of all parties are being filed with the Clerk of the Court together with this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *Amici Curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to its preparation or submission.

receiving of political contributions, *Amici* respectfully submit this brief in support of the petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

This case concerns the criminalization of conduct protected by the First Amendment—the giving and receiving of campaign contributions—based on a vague and indefinite standard that will significantly alter two vital underpinnings of our democracy: the desire of individual citizens to run for political office in a system that largely depends upon private contributions and the liberty of constituents to contribute to political campaigns without fear of criminal liability. The Eleventh Circuit adopted an extraordinarily expansive and unprecedented interpretation of the explicit *quid pro quo* standard necessary to sustain a conviction in the campaign contribution context for "honest services" mail fraud under 18 U.S.C. §§ 2, 1341 & 1346, conspiracy to commit "honest services" mail fraud under 18 U.S.C. § 371, and bribery under 18 U.S.C. § 666(a)(1)(B), ruling that criminal liability may be imposed whenever the prosecution presents evidence that a public official understood that a contribution made to an issue-advocacy campaign was motivated by the donor's desire for the official to take certain actions, and such actions were ultimately taken by the official. In reaching this conclusion, the Eleventh Circuit paid lip service to *McCormick v. United States*, 500 U.S. 257, 273 (1991), in which this Court held that the prosecution must demonstrate

an explicit *quid pro quo* connection between a payment and an official act in campaign contribution cases, *to wit*, an explicit promise or agreement made in return for a contribution, but paradoxically held that such an explicit *quid pro quo* may be *implied* from circumstantial evidence that a public official understood that a political donor made a contribution with the expectation that certain acts would be performed in return. In this way, the Eleventh Circuit's approach treats campaign contributions exactly the same as garden-variety cash payoffs. This Court's ruling in *McCormick*, which explicitly distinguished campaign contributions from all other types of payments because of their significance to the democratic process, does not support that outcome.

The thin reed on which the conviction of Governor Siegelman was based reveals the dangers of the Eleventh Circuit's ruling. In July 1999 and May 2000, Richard Scrushy donated money to a campaign for a lottery initiative supported by Governor Siegelman. In July 1999, Governor Siegelman reappointed Mr. Scrushy to Alabama's "CON" Board, just as the three prior governors of Alabama had done. Although the prosecution presented no evidence of an explicit *quid pro quo* linking Mr. Scrushy's reappointment to the contributions, the Eleventh Circuit affirmed Governor Siegelman's conviction based on an implicit *quid pro quo* standard. This decision stands alone in nullifying the explicit *quid pro quo* requirement in campaign contribution cases, the purpose of which was to pre-

vent the criminal law from unduly impinging on the campaign finance system by criminalizing conduct that has always been believed to be legally protected and essentially unavoidable as long as election campaigns are financed by private contributions. Even outside the criminal realm, this Court has subjected restrictions on political campaign contributions to strict scrutiny as infringements upon the First Amendment rights to engage in free speech and political association. The *criminalization* of the giving or receiving of campaign contributions requires that the government satisfy even a greater burden, which was not satisfied in this case.

As former state Attorneys General, we understand the importance of clearly defining the legal duties that criminal defendants are accused of violating, which not only protects against uncertain liability, but also minimizes the risk of politically-motivated prosecutions. The explicit *quid pro quo* requirement established by this Court in *McCormick* was intended to clearly define and delimit the type of conduct that may be criminalized in the campaign contribution context. The Eleventh Circuit's implicit *quid pro quo* standard exposes every government official who acts to the benefit of a contributor, knowing that the contributor desired such an act to take place, to criminal prosecution. Every President of the United States who appoints a contributor to an Ambassadorship could be subject to prosecution under the Eleventh Circuit's reasoning. Any United States Senator who supports a

cause favored by a contributor is at risk. And, every contributor who has ever been the beneficiary of sought-after political actions runs the same risk of being prosecuted. Assuming this would not destroy the political fundraising mechanisms inherent in our political system, it would nevertheless give unwarranted latitude to prosecutors in selecting, for whatever reasons, those politicians and contributors whom they desire to silence. As many of us have previously run for political office, we are acutely aware that allowing prosecutors to cast such a wide net in the campaign contribution context will stifle the ability of campaigns to legitimately raise needed funds for fear of politically-motivated prosecution. Simply stated, that is an untenable result.

ARGUMENT

The Eleventh Circuit's decision creates extreme uncertainty regarding the breadth of criminal liability in campaign contribution cases, and the potential for the arbitrary and discriminatory enforcement of anti-corruption statutes raises serious First Amendment concerns. This Court should grant certiorari and reverse the Eleventh Circuit's erosion of the level of proof that the government must introduce to establish the explicit *quid pro quo* requirement in campaign contribution cases.

I. A PUBLIC OFFICIAL MAY NOT BE PROSECUTED FOR THE RECEIPT OF A CAMPAIGN CONTRIBUTION IN THE ABSENCE OF AN EXPLICIT *QUID PRO QUO* CONNECTION BETWEEN THE CAMPAIGN CONTRIBUTION AND AN OFFICIAL ACT

Despite the Eleventh Circuit's assertions to the contrary, its interpretation of the government's evidentiary burden frustrates rather than furthers this Court's ruling in *McCormick*. In *McCormick*, this Court held that for criminal prosecutions involving campaign contributions, the government must establish an explicit *quid pro quo* connection between the contribution and an official act—in which "payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act"—so that there is no possible doubt that the challenged transaction was corrupt. *McCormick*, 500 U.S. at 273. But the jury instruction approved by the Eleventh Circuit permitted Governor Siegelman's conviction based on an implicit *quid pro quo* standard that impermissibly treats campaign contributions exactly the same as traditional payoffs. This approach sows confusion as to what conduct constitutes a crime in these circumstances and destroys the protections that this Court has established in campaign contribution cases. We respectfully submit that this Court should clearly require that prosecutors prove the existence of an explicit promise or agreement by a public official that he will perform an official act

in exchange for a contribution, and that jurors are charged that the existence of an explicit promise or agreement must be found, before criminal liability will attach for either: (a) making a political contribution with the hope or expectation of a subsequent official action; or (b) taking an official action after receiving a political contribution from a known donor.

A. Under *McCormick*, Political Contributions May Not Give Rise To Criminal Liability In The Absence Of An Explicit *Quid Pro Quo* Connection Between The Contribution And The Official Act

In *McCormick*, a West Virginia state legislator, Robert McCormick, advocated a legislative program allowing foreign medical school graduates to practice under a temporary permit while studying for state licensing exams. *McCormick*, 500 U.S. at 259. After McCormick sponsored successful legislation extending the expiration date of the temporary permit program, a lobbyist on behalf of the temporarily licensed doctors discussed with McCormick the possibility of introducing legislation that would grant the doctors a permanent medical license by virtue of their years of experience. *Id.* at 259-60. During his 1984 reelection bid, McCormick advised the lobbyist that his campaign was expensive, that he had expended considerable sums out of his own pocket, and that he had heard nothing from the group of doctors. *Id.* at 260. Thereafter, the lobbyist made a series of cash pay-

ments to McCormick. McCormick did not list the payments as campaign contributions or report them on his federal income tax return for that year. *Id.* The payments were also not reflected in the books of the doctors' organization as campaign contributions; the books simply stated that the payments were for McCormick. *Id.* In 1985, McCormick sponsored the legislation that he and the lobbyist had discussed the previous year, speaking at length in favor of the bill during floor debate. *Id.* Two weeks after the bill had been passed and signed into law, McCormick received a final cash payment from the doctors. *Id.*

The government prosecuted McCormick on five counts of violating the Hobbs Act,[2] and one count of filing a false income tax return. *Id.* at 261. The trial judge's supplemental jury instructions on the Hobbs Act claims included the following statement:

> It would not be illegal, in and of itself, for Mr. McCormick to solicit or accept political contributions from foreign doctors who would benefit from this legislation.

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[2] The Hobbs Act, 18 U.S.C. § 1951, provides in relevant part: "(a) Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion . . . in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. (b) As used in this section . . . . (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

> In order to find Mr. McCormick guilty of extortion, you must be convinced beyond a reasonable doubt that the payment alleged in a given count of the indictment was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct, and with knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held.

Id. at 265. The jury convicted McCormick on the tax evasion count and the first Hobbs Act count. *Id.*

The Court of Appeals for the Fourth Circuit rejected McCormick's claim that a conviction of an elected official under the Hobbs Act required proof of an explicit *quid pro quo, to wit,* an explicit promise of official action or inaction in exchange for any payment or property received. *Id.* at 265-66. Instead, the court concluded that no such showing was needed where the parties never intended the payments to be "legitimate" campaign contributions. *Id.* at 266. As this Court described the lower courts' rulings, "[t]he trial court and the Court of Appeals were of the view that it was unnecessary to prove that, in exchange for a campaign contribution, the official *specifically promised* to perform or not to perform an act incident to his office." *Id.* at 267 n.5 (emphasis added).

This Court rejected the Fourth Circuit's analysis, recognizing that applying the same standard to prosecute public officials for receiving campaign

contributions as traditional payoffs would jeopardize our democratic system because the financing of political campaigns depends upon officials accepting contributions from people expecting some kind of benefit in return. As this Court held:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language

> more explicit than the Hobbs Act contains to justify a contrary conclusion.

Id. at 272-73.

To prevent the Hobbs Act from unduly infringing upon legitimate political activity, this Court held that the prosecution is required to prove an explicit *quid pro quo* where campaign contributions are at issue:

> This is not to say that it is impossible for an elected official to commit extortion in the course of financing an election campaign. Political contributions are of course vulnerable if induced by the use of force, violence, or fear. The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, *but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.* This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

Id. at 273 (emphasis added). The explicit *quid pro quo* requirement effectively limits the ability of anti-corruption statutes to reach the giving or receiving of campaign contributions except in cases where the prosecution proves beyond a reasonable doubt that such payments were made in return for an "explicit promise" or agreement by a public offi-

cial to take official action in exchange for a contribution, as manifested by the official's actual assertion that his conduct will be guided by that promise. The standard articulated by the Eleventh Circuit is a significant departure from this Court's view.

B. The Eleventh Circuit's Ruling Departs From This Court's Holding In *McCormick* By Redefining The Explicit *Quid Pro Quo* Requirement As Satisfied By An Inference Of The Public Official's Unspoken State Of Mind Linking A Contribution With An Official Act

The core problem with the Eleventh Circuit's ruling is that, instead of applying the ordinary meaning of "explicit promise or undertaking" linking an official act to a campaign contribution, the court stripped the word "explicit" of any real meaning, holding that "the agreement must be explicit, but there is no requirement that it be express." *United States v. Siegelman*, 561 F.3d 1215, 1226 (11th Cir. 2009). Further compounding this error, the court added that "an explicit agreement may be 'implied from [the official's] words and actions.'" *Id.* (quoting *Evans v. United States*, 504 U.S. 255, 274 (1992)). This strained interpretation of what an explicit *quid pro quo* requires is surely not what this Court had in mind in *McCormick*.

The Eleventh Circuit's holding that "explicit" does not mean "express" ignores the ordinary meaning of "explicit" as "[e]xpressed without vagueness

or ambiguity." Webster's II New Riverside University Dictionary 455 (3d ed. 1994). As a matter of plain language, an "explicit promise or undertaking by the official to perform or not to perform an official act" in return for a campaign contribution cannot be based on an unspoken, merely implied, exchange of the official act for the contribution. Yet under the Eleventh Circuit's interpretation, an official can violate the "honest services" or "bribery" statutes whenever he performs an official act and the prosecution presents evidence that he accepted a contribution from a donor who desired that such act take place.

The Eleventh Circuit's approach is based on its desire to graft into the definition of "explicit promise or undertaking" this Court's statement in *Evans* that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Siegelman*, 561 F.3d at 1226 (quoting *Evans*, 504 U.S. at 268). But *Evans* was a completely different case, and expanding its reach to radically redefine the explicit *quid pro quo* requirement in campaign contribution cases is unjustifiable.

In *Evans*, the appellant was caught in a Federal Bureau of Investigation sting operation, accepting a bribe to vote for a rezoning application. This Court considered a limited issue: "whether an affirmative act of inducement by a public official, such as a demand," is required to violate the Hobbs Act. *Evans*, 504 U.S. at 256. Unremarkably, this Court

concluded that the government need not prove that an official actually intimidated or threatened a victim to make a bribe. *Id.* at 265-66. It further held that the challenged jury instruction satisfied the *quid pro quo* requirement in *McCormick* "because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense." *Id.* at 268. In so holding, the Court rejected petitioner's argument that an "affirmative step" in furtherance of the official act is required, since "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* The level of proof required to demonstrate an explicit *quid pro quo* in campaign contribution cases was never addressed. This Court only emphasized that the Hobbs Act does not require that the official induce a payment through threats, or that the parties ultimately consummate their agreement or even perform an act in furtherance of their agreement.

The Eleventh Circuit's reliance on *Evans* to support the application of an implicit *quid pro quo* standard in campaign contribution cases cannot be squared with this Court's mandate in *McCormick* that "it would require statutory language more explicit than the Hobbs Act contains to justify" criminalizing the giving or receiving of campaign contributions upon anything less than proof of an "explicit promise or undertaking to perform or not

to perform an official act," whereby "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *McCormick*, 500 U.S. at 272. Like the Hobbs Act, neither the text of the "honest services" nor the "bribery" statute contains language suggesting that a crime occurs when an official accepts a campaign contribution that he understands is motivated by the donor's desire for the official to take certain actions, which are thereafter taken. In the absence of a specific directive by Congress, proof of an explicit *quid pro quo* is required.

The Eleventh Circuit's ruling also departs from the decisions of numerous Circuits, which, in ruling that *McCormick's* explicit *quid pro quo* standard applies in campaign contribution cases, have correctly recognized that applying an implicit *quid pro quo* standard in *both* campaign contribution and traditional payoff cases disregards the critical distinction between these types of cases. For example, in *United States v. Blandford*, the Sixth Circuit held:

> Indeed, a strong argument could be advanced for treating campaign contribution cases and non-campaign contribution cases disparately. Campaign contributions, as the *McCormick* Court noted, enjoy what might be labeled a presumption of legitimacy. Although legitimate campaign contributions, not unlike Hobbs Act extortion payments, are given with the hope, and perhaps expectation, that the payment will make the official more likely to

> support the payor's interests, we punish neither the giving nor the taking presumably because we have decided that the alternative of financing campaigns with public funds is even less attractive than the current arrangement. Conversely, if any presumption is to be accorded to payments that occur outside of the campaign contribution context, the presumption would be the antithesis of the one described above. Stated another way, where, as in this case, a public official's primary justification for receiving, with relative impunity, cash payments from private sources, *i.e.*, our present campaign financing system, is not available, that public official is left with few other means of rationalizing his actions.

33 F.3d 685, 697 (6th Cir. 1994). The Sixth Circuit recently held in *United States v. Abbey* that unlike campaign contribution cases, the government need not demonstrate an explicit *quid pro quo* outside the political realm, since "if the *quid pro quo* requirement exists to ensure that an otherwise permissible activity is not unfairly criminalized, then an opposite presumption is likely appropriate when a public official obtains cash or property outside the campaign system because there are few legitimate explanations for such gifts." 560 F.3d 513, 517 (6th Cir. 2009). Other Circuits have similarly distinguished campaign contributions from traditional payoffs for the purposes of criminal liability. *See United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007) ("[P]roof of an express promise is neces-

sary when the payments are made in the form of campaign contributions"); *United States v. Antico*, 275 F.3d 245, 257 (3d Cir. 2001) (declining to extend *McCormick's* explicit *quid pro quo* standard to non-campaign contribution cases because "[o]utside the campaign contribution context, where Amico's case falls, the line between legal and illegal acceptance of money is not so nuanced"); *United States v. Taylor*, 993 F.2d 382, 385 (4th Cir. 1993) ("[I]f the jury finds the payment to be a campaign contribution, then, under *McCormick*, it must find that 'the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act'") (quoting *McCormick*, 500 U.S. at 273); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 937 (9th Cir. 2009) (proof of an explicit *quid pro quo* is required where the "unlawfully gained property is in the form of a campaign contribution" while in other cases, "an agreement implied from the official's words and actions is sufficient to satisfy this element").

The evidence in this case demonstrates the fallacy of the Eleventh Circuit's approach. Governor Siegelman was prosecuted and convicted in the absence of any evidence of an explicit *quid pro quo*. Instead, the evidence showed that: (1) Governor Siegelman felt that Mr. Scrushy ought to donate more to his favored issue than Mr. Scrushy previously donated to the campaign of his competitor; (2) Mr. Scrushy was aware that Governor Siegelman expected at least a $500,000 contribution to

the campaign for the lottery initiative, (3) Governor Siegelman was aware that Mr. Scrushy wanted to be reappointed to Alabama's CON Board (to which Mr. Scrushy had previously been appointed by three prior governors); (4) Governor Siegelman did not think such an appointment would raise any problems; and (5) Governor Siegelman did, in fact, reappoint Mr. Scrushy to the CON Board. There was no evidence that Governor Siegelman ever promised Mr. Scrushy that he would reappoint him to the CON Board in return for a campaign contribution or ever asserted that he was bound to appoint Mr. Scrushy to the CON Board by the terms of any such promise. At best, the evidence shows that Mr. Scrushy desired such an appointment, and Governor Siegelman was aware of this desire. A contributor's expectation of a linkage between the contribution and the action, even when combined with the official's knowledge of that expectation, does not rise to the level of "explicit" under *McCormick*. Indeed, this Court has made clear that a mere expectation of a favorable action following a contribution does not give rise to criminal liability—in fact, it was just such an interpretation of the Hobbs Act that led to the flawed jury instructions rejected by this Court in *McCormick*:

> [T]he jury was told that it could find McCormick guilty of extortion if any of the payments, even though a campaign contribution, was made by the doctors with the expectation that McCormick's official action would be influenced for their

> benefit, and if McCormick knew that the payment was made with that expectation.

McCormick, 500 U.S. at 274.

Redefining the explicit *quid pro quo* standard as satisfied by circumstantial evidence of an implicit promise or agreement thwarts this Court's intent in *McCormick* to define "the forbidden zone of conduct with sufficient clarity" in campaign contribution cases. *Id.* at 273. Indeed, muddling the clear dividing line between lawful and unlawful conduct grants prosecutors the unbridled power to potentially indict and convict any public official and any contributor whenever a campaign contribution was made with the expectation that the official would be influenced for the contributor's benefit, and the official, with knowledge that the contribution was made with that expectation, ultimately took an action consistent thereof. That is precisely the expansive result that this Court tried to prevent in *McCormick*. *Amici* have grave concerns that this opportunity for arbitrary and discriminatory enforcement of the "honest services" and "bribery" statutes has resulted in the selective and unfair prosecution and conviction of Governor Siegelman.

To be perfectly clear, *if* there was sufficient admissible evidence to prove beyond a reasonable doubt that Governor Siegelman and Mr. Scrushy entered into an agreement whereby Governor Siegelman explicitly promised that he would reappoint Mr. Scrushy to the CON Board in exchange for a political contribution, and *if* the jury was

properly instructed that it must find the existence of such an explicit *quid pro quo* agreement based upon the admissible evidence before it, then a conviction could properly stand. But conversely, allowing a conviction based upon an "agreement" merely inferred from circumstantial evidence of an unspoken state of mind cannot be what this Court intended in *McCormick*.

II. THE ELEVENTH CIRCUIT'S DECISION CREATES AN UNDUE CHILLING EFFECT ON A FIRST AMENDMENT RIGHT

Criminalizing the giving and receiving of campaign contributions under either "bribery" or "honest services" statutes without proof of an explicit *quid pro quo* promise or agreement would have strong repercussions that go beyond the conviction of Governor Siegelman. The Eleventh Circuit's approach puts at risk every candidate who accepts a campaign contribution with the knowledge that the donor hopes to influence that candidate, and every donor who contributes to a campaign with the hope or expectation of receiving a benefit who goes on to receive such a benefit. An interpretation tnat criminalizes activities that fall far short of an explicit *quid pro quo* can only lead to an impermissible chilling effect on the First Amendment right to contribute to political campaigns.

This Court has unequivocally held that governmental limitations on political contributions are subject to strict scrutiny because they impinge on the First Amendment's protection of free speech

and political association. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 14-23 (1976); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295-298 (1981). Political contributions are especially protected under the First Amendment when—as in this case—referendum or issue-advocacy campaigns are at issue, since "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14; *see also Roth v. United States*, 354 U.S. 476, 484 (1957). Contributions to issue advocacy campaigns also do not financially benefit the individual politician in the same way as a contribution to an elected official's campaign, and thus there is a reduced likelihood that such donations could lead to corruption. *See, e.g., First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *F.E.C. v. Wis. Right to Life*, 127 S. Ct. 2652, 2677 (2007) (Scalia, J., concurring).

The Eleventh Circuit recognized the importance of these First Amendment concerns in this case:

> The bribery, conspiracy and honest services mail fraud convictions in this case are based upon the donation Scrushy gave to Siegelman's education lottery campaign. As such they impact the First Amendment's core values—protection of free political speech and the right to support issues of great public importance. It would be a particularly dangerous legal error from a civic point of view to instruct a jury that they may convict a defendant for his exercise of

> either of these constitutionally protected activities. In a political system that is based upon raising private contributions for campaigns for public office and for issue referenda, there is ample opportunity for that error to be committed.

Siegelman, 561 F.3d at 1224. The court also acknowledged that restrictions upon contributions to issue-advocacy campaigns are subject to even greater scrutiny because of the greater risk of harm:

> Arguably, the potential negative impact of these statutes on issue-advocacy campaigns is even more dangerous than it is to candidate-election campaigns. Issue-advocacy campaigns are a fundamental right in a free and democratic society and contributions to them do not financially benefit the individual politician in the same way that a candidate-election contribution does.

Id. at 1224 n.13.

The Eleventh Circuit's articulation of the special care required in campaign contribution cases is consistent with this Court's ruling in *McCormick* that in the absence of an explicit *quid pro quo* requirement, the criminal law may unduly impinge on the campaign finance system. *See McCormick*, 500 U.S. at 272. But by then loosening the clear standard for criminal liability established by this Court in campaign contribution cases, the Eleventh Circuit failed to consider that "laws making crimi-

nal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action." *Buckley*, 424 U.S. at 27-28. The explicit *quid pro quo* requirement in *McCormick*, *to wit*, an "explicit promise or undertaking by the official to perform or not to perform an official act" in return for a contribution, *McCormick*, 500 U.S. at 273, was intended to exclude all but "the most blatant and specific" *quid pro quo* arrangements from prosecution in campaign contribution cases.

Public officials and political donors must understand that they will not be indicted or convicted simply because there is circumstantial evidence from which one may infer a connection between a political contribution and an official act. This Court has been especially cautious of laws that lack ascertainable standards of guilt in the sensitive First Amendment area. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 109 n.5 (1972). This same principle precludes criminal liability where the legal duties that the defendant is accused of violating are not clearly defined. *See United States v. Harris*, 347 U.S. 612, 617 (1954). Requiring an explicit *quid pro quo* for a conviction in cases involving contributions to issue-advocacy campaigns, as this Court required in *McCormick* with respect to election campaigns, would avoid the "dangerous" First Amendment implications that even the Eleventh Circuit recognized are implicated by the criminalization of such conduct. *Siegelman*, 561 F.3d at 1224 n.13. Indeed, the fear of

unfettered prosecutorial discretion afforded by a statute whose broad language permits such indictments can only have a chilling effect on free speech and political association protected by the First Amendment. As this Court has reasoned:

> [W]e have recognized recently that the most important aspect of vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.

Kolender v. Lawson, 461 U.S. 352, 358 (1983) (citations omitted); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application"). If the government's ability to criminalize the giving and receiving of campaign contributions is untethered by clear bright line rules, the vicissitudes of politically-motivated prosecutions will have a chilling effect on the lawful conduct of not only existing elected officials and donors, but also those persons contemplating either running for elected office or contributing to political campaigns.

The dangers of the Eleventh Circuit's implicit *quid pro quo* standard are many: first, it subjects public officials to the unreasonable burden of having to reject campaign contributions if there is any reason to believe that such contributions were made by donors desiring that the officials take certain actions; second, if public officials choose to actually accept campaign contributions with that same belief, they now must take pains to *not do* what the donors desire or else face the threat of criminal recriminations; third, donors may fear that their conduct will be subject to retrospective determinations of corruption by unguided juries any time public officials act consistent with their interests; and finally, it exposes public officials and donors alike to politically motivated prosecutions based on an indefinite and potentially all-encompassing standard that may be invoked to justify the prosecution of all sorts of legitimate conduct. This approach cannot be what Congress intended.

Having served as the chief legal officers and/or law enforcement officers of our states, we do not urge any action that might remove a valuable law enforcement tool in the battle to rid government of corruption. At the same time, however, clear legal standards are required to protect individuals from politically-motivated prosecutions based on conduct that is ingrained in our campaign finance system and has always been considered legal. This Court held that the explicit *quid pro quo* standard established in *McCormick* "define[d] the forbidden zone of conduct with sufficient clarity," *McCormick*, 500

U.S. at 273, but the Eleventh Circuit's ruling effectively nullified that standard. The conviction of public officials under a charge of "honest services" mail fraud, conspiracy to commit that offense, or bribery, based on an alleged agreement without the showing of an explicit *quid pro quo* linkage between the official action and the political contribution, will have an impermissible chilling effect on how political campaigns are run throughout the country. This Court should take action now to clarify the standards under which this critical aspect of the democratic process may be subject to the criminal laws.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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In The Supreme Court of the United States

DON EUGENE SIEGELMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

The undersigned are Professors of Law whose scholarship addresses constitutional issues under the First Amendment. Apart from other aspects of this case involving the fair administration of justice in the federal system, the undersigned wish to underline that important First Amendment (as well as Fifth Amendment due process) interests would be served by the Court's addressing the issues stated above.[1]

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than counsel for *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae* and their letters of consent accompany this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

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ISSUES PRESENTED

Does an indictment and prosecution under the federal "honest services" or "bribery" statutes burden the nation's long tradition of candidates raising funds from others and place a chilling effect on the First Amendment right to contribute to political campaigns, if conviction is permitted (a) without any express *quid pro quo* connection between the official act and the campaign contribution, or (b) without carefully delineated boundaries of the evidence required from which the finder of fact may infer that an explicit agreement has been reached, and (c) without independent appellate review of these factual issues? Do the statutes, as interpreted by the court below, violate the Due Process Clause because they fail to provide adequate notice and encourage discriminatory enforcement? Should the "honest services" and "bribery" statutes be construed to require an express agreement in order to avoid unnecessary resolution of these First Amendment and Fifth Amendment questions?

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a person who desired a political appointment, and a public official who (1) wanted a contribution to an issue campaign that he supported and (2) appointed the contributor to the desired position after the contribution was received. The Eleventh Circuit ruled that even though no express agreement was made between the contributor and the political official, the jury could infer that, on the evidence presented, they had "agreed to a deal," and that while "the jurors were free to give it a different construction, they did not."

The First Amendment protects the right to contribute to political causes and the right of recipients to solicit such contributions and spend the funds in furtherance of their candidacy. The Fifth Amendment requires that criminal laws (a) provide fair notice so that reasonable people may understand what conduct is prohibited and (b) establish guidelines to prevent discriminatory law enforcement. It is important that this Court consider whether the federal "bribery" and "honest services" statutes, or the First and Fifth Amendments, require an express *quid pro quo* commitment between contributors and recipients of political contributions before their actions can be made criminal, or, if not an express agreement, what quality and quantity of evidence is needed to permit a jury to infer that an "explicit"

agreement existed.[2] Further, the Court should determine whether trial judges, courts of appeal, and this Court should conduct an independent review of the record to assure that speech prohibited by the statutes falls outside the protection of the First Amendment. Otherwise, government officials who act to benefit a contributor, knowing that the contributor desired such an act to take place, and contributors who have been beneficiaries of sought-after political actions run the serious risk of being prosecuted and convicted. These uncertainties also give a dangerously spacious latitude to prosecutors in selecting, for whatever reasons, those politicians and contributors whom they desire to silence, and encourage the finders of fact to do likewise.

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[2] The federal funds bribery statute bars the taking of a bribe by an official of a state agency that received over $10,000 in federal funds annually. 18 U.S.C. § 666. Honest services mail fraud bars mailing a letter in connection with a scheme to defraud a state agency of an official's honest services in the performance of his official duties. 18 U.S.C. §§ 1341 and 1346.

REASONS FOR GRANTING THE PETITION

A. The Indictment and Prosecution of Government Officials Under the Statutes in This Case Without Requiring Significant Limits on Their Coverage Produce a Significant Burden and a Chilling Effect on a First Amendment Right

1. Factual Setting

This case began when Don Siegelman campaigned for Governor of Alabama on a platform that included establishing a lottery to raise money for education. Taken most favorably to the prosecution, the evidence showed the following: An assistant of Governor Siegelman's, Nick Bailey, testified that after the successful campaign, he was present when Siegelman had a conversation with Eric Hanson, a lobbyist for HealthSouth Corporation (HealthSouth) – the healthcare service provider of which Richard Scrushy was Chairman and Chief Executive Officer. Siegelman stated that in light of a contribution Scrushy made to his opponent in the election, Scrushy would need to contribute $500,000 to the lottery campaign to "make it right." Tr. 500-02.

Bailey testified that after a meeting between Governor Siegelman and Scrushy, Siegelman showed Bailey a check for $250,000 that Scrushy had given him, made out to the Alabama Education Lottery Foundation (AELF), and stated that Scrushy was "halfway there." Tr. 504-07, 509-10. When Bailey asked Siegelman what Scrushy would want in return

for the donation, Siegelman replied "the CON Board," referring to the Certificate of Need Review Board, a state agency from which healthcare providers must obtain a certificate before opening a new facility or offering a special healthcare service. When Bailey asked, "I wouldn't think that would be a problem, would it?", Siegelman replied, "I wouldn't think so." Tr. 507.

Mike Martin, HealthSouth's former Chief Financial Officer, testified that Scrushy had told him that if they helped Siegelman raise money for the lottery campaign, "[they] would be assured a seat on the CON Board." Bailey testified that in May 2000 he traveled with Siegelman to Birmingham, where the Governor picked up another check for $250,000 from Scrushy at Scrushy's office. This check was made out to the Alabama Education Foundation (AEF), a successor to the AELF. Tr. 538-39, 548, 1117-21. By this time, the lottery referendum had been defeated. These checks were eventually used to reduce a bank loan to the Foundation that Siegelman had personally guaranteed, the proceeds of which had been used to cover expenses of the lottery campaign. On July 26, 1999, Siegelman reappointed Scrushy to one of the seats on the nine person CON Board, a position that Scrushy previously held under three governors. Tr. 517-18, 1419. Bailey also testified that Siegelman arranged for Scrushy to be vice-chair "because [Scrushy] asked for it."

In this case, there was no direct evidence that Siegelman and Scrushy had ever discussed a

connection between a contribution and reappointment to the board, let alone that there was a *quid pro quo*. Rather, if the prosecution's evidence is to be credited, it appears that Scrushy hoped to curry favor with Siegelman by supporting a pet cause, and Siegelman was disinclined to reappoint someone who had supported an opponent without some clear sign of equally great support for the governor's program. As the Court plainly indicated in *McCormick v. United States*, 500 U.S. 257 (1991) (discussed at greater length *infra*), this is the ordinary stuff of politics, as well as part of a national tradition of reliance by public officials on financing their campaigns through funds provided by others which began very early in our history, was significantly enlarged in the Jacksonian era and then in the last decades of the 19th Century, and has continued its great expansion since then.[3] Yet, both the individual contributing to an issue campaign and the governor raising questions about a reappointment are exposed to felony conviction under the lower court's interpretation of the law, which permitted the jury in this case to infer the existence of an explicit agreement from this parallel behavior and held that no express agreement was required under *McCormick*.

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[3] See, e.g., Herbert E. Alexander, *Financing Politics* ch. 2 (4th ed. 1992); Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L. J. 871, 881-83 (2004).

2. Unclear Standards and Undue Discretion

The Court's analysis, in its foundational ruling affording First Amendment protection for financial support of a political campaign, of the critical function of contributions and their role in supporting candidates and enhancing political debate has become even more relevant today:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. . . . The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Buckley v. Valeo, 424 U.S. 1, 19 (1976).

Indeed, the Court has described contributions to referendum or issue-advocacy campaigns, such as the Education Lottery effort in this case, as "the type of speech indispensable to decision-making in a democracy. . . ." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978). For more than a half century, the Court has acknowledged the dangers of

imprecise regulations that affect the exercise of First Amendment rights, reasoning that:

> [s]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.

Smith v. California, 361 U.S. 147, 151 (1959) (citing *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)).

The discretion afforded to prosecutors, trial judges, and juries by "bribery" and "honest services" statutes that (a) do not require an express *quid pro quo* between the official act and the campaign contribution, or (b) lack carefully delineated boundaries of the evidence required to allow the finder of fact to infer that an explicit agreement has been reached, permits indictments, prosecutions and convictions of the kind in this case that violate freedom of speech. In a related context, this Court has recognized the threats posed to First Amendment values by granting prosecutors and factfinders broadly defined boundaries, noting:

> [T]hat in the area of free expression . . . placing unbridled discretion in the hands of a government official . . . intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. . . . Standards provide the guideposts that check the . . . [official] and allow courts quickly and easily to determine whether the

> . . . [official] is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the . . . official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the . . . [official] is permitting favorable, and suppressing unfavorable, expression.

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757-58 (1988).

The Court has further emphasized:

> [T]hat the more important aspect of vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.

Kolender v. Lawson, 461 U.S. 352, 358 (1983) (citations omitted).

Placing limits on prosecutorial discretion, and articulating standards with predictable application for the review of decisions by judges and juries in respect to the quality and quantity of evidence required for conviction, is especially called for to curtail the perils confronting freedom of speech in the context presented by this case: indictments brought by an administration of one political party against a high ranking government official of an opposing

political party who is in the middle of a hotly contested election campaign.

3. Scope of Appellate Review

In reviewing the evidence in detail and affirming the convictions under the "honest services" and "bribery" statutes, the Eleventh Circuit afforded ordinary deference to the jury's decisions: "The jury's verdict commands the respect of this court, and that verdict must be sustained if there is substantial evidence to support it." 561 F.3d at 1219. But the First Amendment demands more. As this Court stated in its landmark *New York Times* decision:

> This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of . . . the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." We must 'make an independent examination of the whole record,' so as to assure ourselves

> that the judgment does not constitute a forbidden intrusion on the field of free expression.

New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (citations omitted).

Properly defined violations of the "bribery" and "honest services" statutes are within the "categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend," *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984), categories which the Court has held to include libelous speech, fighting words, incitement to riot, obscenity, and child pornography. *Id.* However,

> [i]n such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact

> may inhibit the expression of protected ideas.

Id. at 505.[4]

As indicated earlier, these precautions for careful appellate review as well as clearly articulated standards carry special force in the context of prosecutions of high ranking political officers as in cases such as this one. Especially because the content of what it means for trial judges and courts of appeal to exercise their duty to engage in an independent review of the evidence has not been very fully addressed by this Court, it should grant review in this case to provide needed guidance. For example, assuming that Bailey's testimony is true (a matter of credibility to be left to the jury), there are several standards that might be used to determine whether the inferences that might be drawn support the conclusion that an explicit agreement was reached beyond a reasonable doubt: Should the courts review the question *de novo*? Should *some* deference be

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[4] The point is well illustrated in *St. Amant v. Thompson*, 390 U.S. 727 (1968), where both the Supreme Court of Louisiana and the trial judge found that the defendant in a defamation action by a public official had acted "recklessly." This Court reversed because the facts "fall short of proving [defendant's] . . . reckless disregard," which "cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication" to "protect against self-censorship and thus adequately implement First Amendment policies," *id.* at 730-32.

granted to the jury? Or should there be a standard that falls some place between the two?

B. The Interpretation By the Court Below of the Statutes in This Case Violates the Fifth Amendment Because It Affords Inadequate Notice to Reasonable People of What Conduct Is Criminal and Authorizes Law Enforcement Officials to Impermissibly Discriminate

Wholly independent of the First Amendment, this Court long ago described vagueness in the terms of a penal statute as violating "the first essential of due process of law," *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The rationale for this precept was clearly explained more recently when the Court ruled that a broadly phrased anti-"loitering" ordinance did not interfere with protected speech, but did violate due process:

> Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

The court below construed the "bribery" and "honest services" statutes as making it a crime if the jury could infer that an agreement had been reached,

rather than requiring the jury to find an express *quid pro quo*. First, this violates the Due Process Clause because it creates a genuine uncertainty for public officials and potential contributors to political campaigns as to whether criminal charges may result from making a contribution with the hope or expectation, based on traditional practices and specific prior conduct, that some favorable treatment will come from the recipient, and the expectation is then fulfilled.

Second, the failure to "establish minimal guidelines to govern law enforcement," *Kolender v. Lawson, supra*, is especially dangerous in the context of this case because of the great danger, referred to above, of the abuse of power in prosecuting political opponents.

C. The "Bribery" and "Honest Services" Statutes Should Be Construed to Avoid the First and Fifth Amendment Issues

In *McCormick v. United States,* 500 U.S. 257 (1991), the Court reversed the conviction of a state legislator who received a campaign donation for which he was prosecuted for "extortion" under the Hobbs Act, 18 U.S.C. § 1951, defined as "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." The facts were that after the legislator had advocated a program favorable to foreign medical school graduates, they hired a lobbyist who discussed with him the

possibility of his introducing further helpful legislation. He advised the lobbyist that he had expended considerable sums of his own in their behalf, and that he had heard nothing from them. Thereafter, a series of payments were made to the legislator by the lobbyist. In interpreting the Hobbs Act to apply "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act," the Court observed:

> [T]he jury was told that it could find McCormick guilty of extortion if any of the payments, even though a campaign contribution, was made . . . with the expectation that McCormick's official action would be influenced for their benefit, and if McCormick knew that the payment was made with that expectation. . . .
>
> . . . Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is

> unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

Id. at 274, 272.

In this case, the jury charge did not include defendant's request for a *quid pro quo* instruction; rather, the district court told the jury that it could not convict unless "the defendant and the official agree that the official will take specific action in exchange for the thing of value." The court below, acknowledging the Seventh Circuit's conclusion that "extortion and bribery are but 'different sides of the same coin,'" 561 F.3d at 1225 (citing *United States v. Allen,* 10 F.3d 405, 411 (7th Cir. 1993)), nonetheless affirmed Siegelman's conviction on the ground that "the agreement must be *explicit*, but there is no requirement that it be *express*," 561 F.3d at 1226. On this basis, the court below concluded that the jury could infer that, on the evidence presented, they had "agreed to a deal," and that while "the jurors were free to give it a different construction, they did not." *Id.* at 1228.

In view of the consequential First and Fifth Amendment issues discussed above, this Court should grant review to determine whether the "bribery" and "honest services" statutes should be construed to avoid deciding these constitutional questions. Otherwise, public officials and contributors to issue and candidate campaigns will face the risk

that a prosecutor will single them out for prosecution and that a conviction will be obtained based on a jury's surmises about the mental states of the actors. The result would plainly burden and chill the vigorous political discussion that is crucial to our democracy.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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